

Case No. 14-60796

**UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

ENTERGY MISSISSIPPI, INCORPORATED,

Petitioner Cross–Respondent

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent Cross–Petitioner

**ON PETITION FOR REVIEW, AND CROSS-APPLICATION FOR
ENFORCEMENT, OF DECISION AND ORDER BY THE NATIONAL
LABOR RELATIONS BOARD**

**ORIGINAL BRIEF OF PETITIONER – CROSS RESPONDENT
ENTERGY MISSISSIPPI, INC.**

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

1. Benjamin H. Banta of Entergy Services, Inc., counsel for the Petitioner – Cross Respondent in this appeal, Entergy Mississippi, Inc.¹ Entergy Services, Inc. is a wholly-owned subsidiary of Entergy Corporation and is an affiliate of Entergy Mississippi, Inc.
2. Linda Dreeben, counsel for the Respondent – Cross Petitioner in this appeal, the National Labor Relations Board.

¹ The correct name for this entity, as stated in the Petition for Review that initiated this appeal, is Entergy Mississippi, Inc.

3. Entergy Corporation, which is the parent corporation of Entergy Mississippi, Inc., which, in turn, is the Petitioner – Cross Respondent in this appeal.
4. Entergy Mississippi, Inc., the Petitioner – Cross Respondent in this appeal.
5. Jill A. Griffin, counsel for the Respondent – Cross Petitioner in this appeal, the National Labor Relations Board.
6. Elizabeth Ann Heaney, counsel for the Respondent – Cross Petitioner in this appeal, the National Labor Relations Board.
7. International Brotherhood of Electrical Workers, Local Unions 605 and 985, AFL-CIO-CLC, the Intervenor in this appeal.
8. Nora Leyland of Sherman, Dunn, Cohen, Leifer & Yellig, P.C., counsel for the Intervenor in this appeal, the International Brotherhood of Electrical Workers, Local Unions 605 and 985, AFL-CIO-CLC.
9. M. Kathleen McKinney, Regional Director of Region 15 of the Respondent – Cross Petitioner in this appeal, the National Labor Relations Board.
10. The National Labor Relations Board, the Respondent – Cross Petitioner in this appeal.
11. Sarah Voorhies Myers of Chaffe McCall, L.L.P., counsel for the Petitioner – Cross Respondent in this appeal, Entergy Mississippi, Inc.

12. G. Phillip Shuler, III of Chaffe McCall, L.L.P., counsel for the Petitioner –
Cross Respondent in this appeal, Entergy Mississippi, Inc.

/s/ G. Phillip Shuler III

Attorney of record for the Petitioner – Cross
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STATEMENT REGARDING ORAL ARGUMENT

Oral argument would significantly aid the Court's decisional process for at least three reasons. First, the origin of this case dates back to 2003, and the administrative record is voluminous. Second, this case involves the issue of whether individuals employed as Dispatchers qualify as statutory supervisors pursuant to the National Labor Relations Act based on their specific job duties, and oral argument would assist the application of detailed facts (from the voluminous record) to the labor-law analysis of supervisory status. Finally, to the extent that the voluminous record coupled with this Court's reasonable word/page limitations preclude either side from fully amplifying any issues or arguments in their respective briefs, oral argument would provide an opportunity for further discussion.

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STATEMENT REGARDING JURISDICTION

Pursuant to 29 U.S.C. §§ 160(e) and (f), this Court has jurisdiction over Entergy Mississippi, Inc.’s (“EMI”) petition for review – and the National Labor Relations Board’s (“NLRB”) cross-application for enforcement – of a final decision and order of the NLRB dated October 31, 2014. The petition for review was timely and promptly filed by EMI on November 4, 2014, and the cross-application for enforcement was subsequently filed by the NLRB on December 8, 2014.

STATEMENT OF THE ISSUES

1. Whether the National Labor Relations Board's decision that Dispatchers are bargaining-unit employees lacks a reasonable basis in the law when the Board rejected its prior opinions, as well as the jurisprudence from this Court and seven other circuit courts, all of which conclude that utility-industry Dispatchers are statutory supervisors pursuant to the National Labor Relations Act.
2. Whether the National Labor Relations Board's decision that Dispatchers at Entergy Mississippi, Inc. are bargaining-unit employees is not supported by substantial evidence, when: (i) Dispatchers use independent judgment and are accountable for both the performance of the Field Employees that they direct and the efficient restoration of power; and (ii) Dispatchers use independent judgment in their assignment of trouble situations and outage overtime to Field Employees.
3. Whether the National Labor Relations Board's eleven-year delay in handling this case has unjustly prejudiced Entergy Mississippi, Inc. by exponentially increasing its liability exposure.

STATEMENT OF THE CASE

A. Course of Proceedings and Procedural History.

This matter has a long and detailed procedural history spanning more than a decade. In 2003, Entergy Mississippi, Inc. (“EMI” or “the Company”) filed a unit-clarification petition, seeking to remove transmission and distribution dispatchers (“the Dispatchers”) from a pre-existing bargaining unit (which was represented by the Intervenor-Unions) because the Dispatchers were supervisors, not employees.² After conducting a hearing and accepting evidence over a nine-day period in 2003, the Acting Director for Region 15 of the National Labor Relations Board (the “NLRB” or the “Board”) issued his original decision, finding that Dispatchers were employees pursuant to the National Labor Relations Act (the “NLRA” or “the Act”).³

EMI thereafter filed a timely Request for Review to the NLRB, which was granted on April 20, 2004.⁴ After a delay of more than two years, on September 30, 2006, the Board remanded the matter back to Region 15 for further consideration in light of the Board’s recent decision in *Oakwood Healthcare, Inc.*,

² III, Bd.Ex.1a. EMI cites to the Certified List of Documents by volume and page number(s). Citations to hearing exhibits are by volume number, then “P” for Petitioner or “Bd” for NLRB, and then exhibit number (e.g. ____, P.Ex.____). Citations to this Court’s appellate record are by the record document number (e.g. Doc. ____).

³ VI, 565-95.

⁴ VI, 918.

348 N.L.R.B. 686 (2006) (“*Oakwood*”), and its related cases.⁵ Following a supplemental hearing held on December 11-12, 2006 and the submission of briefs by the parties, the Region issued a supplemental order and decision, purportedly based on *Oakwood*, finding that the Dispatchers were employees, not statutory supervisors.⁶

EMI again timely petitioned the Board for review, which was granted on April 11, 2007.⁷ After considering the case for nearly five years, the Board finally issued a decision on December 30, 2011, affirming (via a 2-1 vote) the Region’s decision that the Dispatchers were employees.⁸

In light of its decision, the Board issued a Consolidated Complaint against EMI based on unfair labor practice charges filed by the Unions in 2003, 2004, and 2006 concerning the Company’s failure to bargain over the Dispatchers’ terms and conditions of employment.⁹ In response to the General Counsel’s motion for summary judgment, the Board issued its decision and order in *Entergy Mississippi, Inc.*, 358 N.L.R.B. No. 99, on August 14, 2012, granting the General Counsel’s motion and ordering, *inter alia*, EMI to return the Dispatchers to the bargaining

⁵ V, Bd.Ex.1b.

⁶ VI, 1115-49.

⁷ VII, 1916.

⁸ VII, 1925-36.

⁹ VII, 1952-64.

unit and, upon request, bargain with the Unions regarding the Dispatchers.¹⁰ EMI subsequently and timely petitioned this Court on August 15, 2012 for review of the Board's decision.¹¹ Also at issue in that appeal was whether the NLRB had the requisite quorum of members at various material times during the Agency proceeding; EMI asserted that the Board lacked a quorum because certain members of the NLRB were invalidly appointed by President Barack Obama pursuant to the Recess Appointments Clause of the U.S. Constitution.¹²

Following the Parties' filing of comprehensive briefing regarding the statutory issue underlying the appeal, as well as the quorum issue, this Court stayed the pending appeal (on EMI's urging) because the identical Constitutional quorum issue before this Court also was pending before the U.S. Supreme Court in *National Labor Relations Board v. Noel Canning* (No. 12-1281).¹³ Following the U.S. Supreme Court's decision in *Noel Canning*, 134 S. Ct. 2550 (2014), holding that certain Members of the Board were improperly appointed and the Board lacked a quorum at various times, this Court granted the Board's Opposed Motion

¹⁰ VII, 1996-2000. In footnote 5 therein, the Board noted Member Hayes' dissent in the Board's earlier decision on review.

¹¹ Doc. 00511958288, Case No. 12-60644, Petition for Review of an Order of the National Labor Relations Board filed by Entergy Mississippi, Inc., dated August 15, 2002.

¹² Doc. 00512126977, pp. 58-67, Case No. 12-60644.

¹³ Doc. 00512381073, Case No. 12-60644, Order dated September 20, 2013.

to Vacate and remanded this matter back to the Board for further proceedings on August 1, 2014.¹⁴

On October 31, 2014, the Board again concluded that Dispatchers were not supervisors and, thus, EMI committed an unfair labor practice by failing to bargain over the Dispatchers' terms and conditions of employment.¹⁵ And, again, EMI timely petitioned this Court on November 4, 2014 for review of the Board's October 31, 2014 decision. Thereafter, the NLRB filed a cross-application for enforcement of the Board's October 31, 2014 decision.¹⁶

At all relevant times, EMI has maintained – and continues to maintain – that the Dispatchers are supervisors pursuant to the NLRA and, thus, EMI cannot be compelled to bargain with the Unions over the terms and conditions of the Dispatchers' employment.

B. Statement of Facts.

Entergy Corporation ("Entergy"), EMI's parent company, is a power utility that provides electricity throughout portions of the Southeastern United States. Due to utility regulation and the evolution of its business, Entergy is organized into several affiliated companies or subsidiaries located in Mississippi (EMI), Texas,

¹⁴ Doc. 00512727807, Case No. 12-60644, *Per Curiam* Order of Court dated August 1, 2014.

¹⁵ VII, 2002-07.

¹⁶ Doc. 00512865964, Case No. 14-60796, Cross-Application for Enforcement of an Order of the National Labor Relations Board dated December 8, 2014.

Arkansas, and Louisiana. (I, 25; IV, 76-79, 422.) While constituting separate corporate entities, these subsidiaries operate as an integrated electrical system with common management, procedures, and resources (including personnel such as the Dispatchers). (IV, 367-71, 417, 421-24.)

For this reason, the Dispatchers at all of Entergy's subsidiaries and affiliates perform the same duties, have the same responsibilities, and are subject to the same terms and conditions of employment. (*Id.*) Indeed, all of Entergy's Dispatchers use the same computers, equipment, software, and Switching, Tagging and Clearance Procedures, and have the same authority to assign and responsibly direct Field Employees. (IV, 365-74, 420-38.) But only the Dispatchers at EMI have yet to be removed from a union-represented bargaining unit pursuant to Board processes. (IV, 29-33, 77-79.)

The Dispatchers at EMI (and throughout Entergy) are responsible for not only managing the transmission and distribution of power throughout the electrical system, but also for ensuring that power outages are minimized in occurrence and duration.¹⁷ (I, 207; IV, 29, 249-50.) These responsibilities are exceedingly important because unscheduled outages can affect the health and safety of EMI's

¹⁷ Transmission Dispatchers, who work in the Transmission Operation Center ("TOC"), manage and control the transmission of power from generators to substations and are responsible for monitoring load and voltage on the system. Distribution Dispatchers, who work in the Distribution Operation Center ("DOC"), manage and control the transmission of power from substations to the customers. (I, 26-27, 486; IV, 29.)

customers and employees, as well as EMI's profits.¹⁸ (III, P.Ex.5b; IV, 283-84, 383-85, 440-41, 459-60; V, P.Ex.66.) As such, the Dispatchers operate on a rotating basis – 24 hours a day, seven days a week – to accomplish these goals, doing so without any supervision the majority of the time. (IV, 249-50, 270-73; 295.)

The Dispatchers manage the restoration of power by monitoring and supervising the electrical system, controlling and directing planned outages, and reacting to issues of “trouble”¹⁹ to minimize unplanned outages. (I, 207; II, 1108; IV, 70.) They accomplish the latter two responsibilities by assigning Field Employees to a particular issue and then directing them through the switching process.²⁰ (II, 1258-59; IV, 70, 459-63, 483-86.) Switching is the act of opening or closing switches located throughout Entergy's electrical transmission and distribution system with the purpose of directing, redirecting, and isolating power feeds. (IV, 107; VII 1925.) The Dispatchers direct the Field Employees through “Switching Orders,” which are physical documents drafted by the Dispatchers that

¹⁸ The rates EMI is permitted to recover are directly tied to its ability to minimize unscheduled power losses and to efficiently restore power. (IV, 56-60, 137-41 and V, P. Exs. 8, 18.)

¹⁹ “Trouble” refers to any situation that has caused an outage or otherwise disturbed the proper transmission of power, and encompasses technical issues within a substation or other EMI equipment, a disturbance caused by weather, or even a car hitting a pole. (I, 32, 776; IV, 237.)

²⁰ “Field Employees” generically references various classifications of bargaining-unit employees who are assigned and directed by Dispatchers, including linemen, crewmen, troublemen, switchmen, and substation employees. (I, 32-36.)

provide step-by-step instructions to Field Employees regarding switching. (I, 72-82, 92-93; II, 1258-59, IV, 107-09, 483-84.)

In assigning Field Employees to locations and directing them through the switching process, the Dispatchers exercise significant supervisory control, particularly during trouble situations. (I, 177-79, 775-789; IV, 70.) Initially, the Dispatcher determines to which trouble the Field Employee should respond (since there typically are numerous trouble situations at any given time), how many Field Employees should respond to the respective trouble (a determination that requires the Dispatcher's assessment of the number of customers affected by the problem, the location of the Field Employees, the weather, the types of customers, and the potential for other trouble), and the types of Field Employees to assign to any given trouble situation. (I, 775-815; II, 1109; III, P. Exs. 48, 49; IV, 167, 236-41.) In making these assignments, the Dispatcher can use existing resources or call additional Field Employees to work as needed. (*Id.*; *see also* IV, 270.) Thereafter, the Field Employees are completely within the control of the Dispatcher, who will assign and route them as necessary. (IV, 410-11, 460-62, 471.)

The Dispatchers make judgments to resolve trouble situations, which significantly affect the terms and conditions of Field Employees' employment. For example, the Dispatchers often are required to: (i) redirect a Field Employee to a different work area, including those outside his or her normal network area; (ii)

direct a Field Employee to perform various tasks once assigned to a particular area; (iii) authorize and require a Field Employee to accept and finish an assignment, even if it requires overtime; (iv) require a Field Employee who is already working overtime to accept another assignment; and (v) require a Field Employee to remain at work beyond his or her scheduled shift if the Dispatcher anticipates that trouble may develop. (II, 1109-16; IV, 410-11, 460-76, 483-86.) The Field Employee is not released from duty until signed out by the Dispatcher. (IV, 154-56, 241, 410.)

Significantly, the Dispatchers are evaluated based on how long it takes them, along with the Field Employees whom they manage, to get power restored. (IV, 220-26, 378-82, 440-47.) Dispatchers who fail to properly supervise Field Employees, or fail to timely restore power, are counseled or disciplined. (IV, 153-55, 164, 176-78, 314-20, 322-26; V, P.Ex.35.) Conversely, Dispatchers who effectively manage Field Employees and minimize power outages receive larger bonuses and salary increases. (*Id.*; *see also* IV, 381-82.)

SUMMARY OF ARGUMENT

The Board's decision that the Dispatchers are not statutory supervisors lacks a reasonable basis in the law and is not based on substantial record evidence. In finding that the Dispatchers at EMI were bargaining-unit employees, the Board ignored this Court's precedent in *Entergy Gulf States*, which held that Entergy's Dispatchers in Louisiana and Texas (who have the same job duties and

responsibilities as EMI's Dispatchers) qualified as statutory supervisors. *Entergy Gulf States, Inc. v. NLRB*, 253 F.3d 203 (5th Cir. 2001). The Board also disregarded its prior precedent, as well as the decisions of seven other circuit courts, all of which conclusively found that Dispatchers with similar job duties and responsibilities were supervisors within the meaning of the NLRA. Given the overwhelming weight of authority, the Board's decision thus lacks a reasonable basis in the law.

Moreover, EMI presented undisputed evidence that its Dispatchers are statutory supervisors because they use independent judgment to assign and responsibly direct Field Employees. The Board's contrary conclusion is not based on substantial record evidence but, instead, represents a strained effort to conform to a predetermined outcome. As such, this Court has a completely separate basis to deny enforcement of the Board's order.

Finally, because the Board took approximately eleven years to decide an issue that the circuit courts have settled, this Court should apply the doctrine of laches to bar enforcement of the Board's order and prevent undue prejudice to EMI.

ARGUMENT

I. The Board’s Decision That Dispatchers Are Not Statutory Supervisors Lacks a Reasonable Basis in the Law.

Section 2(3) of the NLRA, 29 U.S.C. § 152(3), excludes any individual employed as a “supervisor” from the definition of “employee” and, consequently, from the Act’s coverage. An individual is deemed to be a supervisor pursuant to Section 2(11) of the Act if he or she possesses:

authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, *assign*, reward, or discipline other employees, *or responsibly to direct them*, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

29 U.S.C. § 152(11) (2013) (emphasis added). By this standard, the presence of *any one* of the 12 listed criteria establishes supervisory status, so long as it is accompanied by the use of independent judgment.²¹ *Monotech of Miss. v. NLRB*, 876 F.2d 514, 517 (5th Cir. 1989). The actual exercise of the indicia of supervisory status is irrelevant, so long as the authority exists. *Beverly Enterps.-Minn., Inc. v. NLRB*, 266 F.3d 785 (8th Cir. 2001); *see also Wal-Mart Stores, Inc.*, 340 N.L.R.B. 220, 223 (2003).

²¹ In addition, the purported supervisor’s authority must be held “in the interest of the employer.” *NLRB v. Health Care & Ret. Corp. of Am.*, 511 U.S. 571, 573-74 (1994). This requirement is not in dispute in this appeal.

In this case, the Board rejected its prior opinions, as well as the jurisprudence from this Court and seven other circuit courts, all of which conclude that utility-industry Dispatchers²² responsibly direct employees with the use of independent judgment and, thus, qualify as statutory supervisors. Because the Board's decision therefore lacks a reasonable basis in the law, it should be rejected by this Court.

A. A Heightened Standard of Review Applies to this Case.

At issue in this case is whether the Dispatchers at EMI are “supervisors” pursuant to Section 2(11) of the NLRA. Because EMI is the party claiming supervisory status, EMI carries the burden of proving that the Dispatchers are supervisors. *NLRB v. Ky. River Cmty. Care, Inc.*, 532 U.S. 706, 710-12 (2001).

This Court has previously explained the standard of review that governs the determination of supervisory status:

Whether an employee is a supervisor is a question of fact. We must determine whether substantial evidence in the record supports the conclusion that [the workers at issue] are not supervisors, and whether the Board's decision has a reasonable basis in the law. . . . Substantial evidence is evidence a reasonable mind might accept as adequate to support a conclusion²³. . . . Because of the infinite and

²² Though the nomenclature sometimes differs between companies (*e.g.*, system operators, dispatchers, operations coordinators, system supervisors, etc.), the term “Dispatcher” as used herein encompasses all utility-industry employees who manage the transmission and distribution of power, as well as its restoration.

²³ See also *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477-78, 488 (1951) (stating that “substantial evidence” is “more than a mere scintilla” and means “such relevant evidence as a

subtle gradations of authority within a company, courts normally extend particular deference to NLRB determinations that a position is supervisory. . .

When an agency's legal interpretation of a statute conflicts with its prior positions, however, the interpretation is entitled to considerably less deference by the courts than a consistently held agency view . . . Although the NLRB can change its policies and must respond to new circumstances, a departure from past agency precedents requires at least a reasoned explanation of why this is done.

Entergy Gulf States, Inc., 253 F.3d at 208 (subsequent and internal citations and quotations omitted) (emphasis added).

There can be no debate that, over the decades, the Board has waffled on the issue of whether utility-industry Dispatchers are supervisors:

- Originally, the Board consistently found that Dispatchers were bargaining-unit employees. *See, e.g., West Penn Power Co.*, 143 N.L.R.B. 1316 (1963).
- In 1983, however, the Board reversed course in *Big Rivers Electrical Corporation*, 266 N.L.R.B. 380 (1983). Therein, the Board “bowed to the body of caselaw [from the courts]” and recognized that Dispatchers in the utility industry were, in fact, statutory supervisors because they used

reasonable mind would accept as adequate to support a conclusion,” but also explaining that “[t]he substantiality of evidence must take into account whatever in the record fairly detracts from its weight”); 29 U.S.C. §§ 160(e) & (f) (2013) (articulating the “substantial evidence on the record considered as a whole” standard).

independent judgment to responsibly direct Field Employees. *Id.* at 382, 383 n.2.

- Sixteen years later, in 1999, the Board decided to “re-examine” the Dispatcher issue in *Mississippi Power & Light Co.* (“MP&L”), 328 N.L.R.B. 965 (1999). And, again, the Board reversed course. In *MP&L*, the Board explicitly overruled its prior decision in *Big Rivers*, finding that Dispatchers lacked independent judgment and, thus, were not statutory supervisors. *Id.* at 973-74.

Contrary to the above-described history, the Board is supposed to maintain a consistent approach to bargaining-unit determinations. *Fiber Glass Sys. v. NLRB*, 807 F.2d 461, 464 (5th Cir. 1987). If it fails to do so – as has happened with respect to utility-industry Dispatchers – then this Court is not obligated to, nor should it, afford much deference to the Board’s legal interpretation. *Entergy Gulf States*, 253 F.3d at 210 (giving merely “little judicial deference” to the Board’s determination that Dispatchers were bargaining-unit employees); *see also NLRB v. Winnebago Television Corp.*, 75 F.3d 1208, 1214 (7th Cir. 1996) (“... the NLRB’s manipulation of the [Supervisor] definition provided in [Section 2(11)] has earned it little deference.”).²⁴

²⁴ *Cf. also Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2165-70 (2012) (diluting the degree of deference owed to the U.S. Labor Department due to the Department’s shifting and

In contrast to the Board’s waffling, eight circuit courts of appeal – which, after review, either enforce or reject Board orders – have concluded that utility-industry Dispatchers are supervisors under the NLRA. In all, nine appeals courts have analyzed this issue (citations provided *infra*), including the Fifth Circuit in *Entergy Gulf States, supra*. Given this Court’s prior *Entergy Gulf States* opinion coupled with the circuit courts’ near unanimity, it would be generous to afford the Board even “little judicial deference.”

B. *Entergy Gulf States Is Controlling and Mandates a Finding That Dispatchers at EMI Are Statutory Supervisors.*

EMI has a sister company, Entergy Gulf States;²⁵ and the Board and this very Court have already addressed the issue of whether Dispatchers at Entergy Gulf States, *which have nearly identical responsibilities and terms and conditions of employment as the Dispatchers at EMI*, are supervisors under Section 2(11) of the NLRA. In the administrative phase of that case, the Board (which, as detailed above, has a history of waffling on the issue) decided that Entergy’s Dispatchers in Texas and Louisiana were employees, not supervisors. *Entergy Gulf States, Inc.*, 330 N.L.R.B. No. 196 (2000). But the Fifth Circuit *rejected* the Board’s decision,

conflicting positions with respect to its interpretation and enforcement of one of its own regulations, and concluding that the Department’s most recent interpretation of the regulation was not persuasive “in its own right”).

²⁵ Given certain business and regulatory considerations, Entergy Gulf States was subsequently separated into two smaller companies, Entergy Texas and Entergy Gulf States Louisiana, which operate exclusively within Texas and Louisiana, respectively. (IV, 76-77.)

concluding that “because OCs [Dispatchers at Entergy Gulf States] responsibly direct field workers using independent judgment, they are statutory supervisors.” *Entergy Gulf States*, 253 F.3d at 211 (opinion by Jones, J., with R. Garza, J., and Davis, J., on the panel).

Entergy Gulf States is controlling, and this Court should follow it for multiple reasons. First, it was decided by this very Court. Second, the OCs in *Entergy Gulf States* execute virtually the same duties and responsibilities, using the same independent judgment, as Dispatchers at EMI. Third, both the *Entergy Gulf States* case and the case at bar involve the same legal standards, which include, at most, “little judicial deference” owed to the Board. As a consequence of the foregoing, there is no rational basis for this case to be decided differently from *Entergy Gulf States*.

The first reason stated in the preceding paragraph requires no further discussion. The second and third reasons are discussed in turn below.

1. *The Entergy Gulf States and Entergy Mississippi cases involve the same facts.*

The Acting Regional Director and the Board inappropriately disregarded *Entergy Gulf States*, apparently finding it irrelevant and purportedly “factually distinct” to the case at bar. (VI, 1141.) However, neither the Region’s opinion nor the Board’s subsequent decision on review cites any record evidence showing how

Entergy Gulf States and the case at bar are different in any material way. Indeed, there is no explanation provided whatsoever.

The *uncontroverted* evidence from numerous witnesses establishes that Dispatchers at Entergy Gulf States and EMI, as well as at *all* of the other Entergy utilities, perform the same job duties and functions:

Q: But functionally, do all Entergy [Dispatchers] operate in the same way?

A: Yes, they do.

....

Q: Same authority to assign field personnel?

A: Yes, they do.

Q: Same authority to direct the work of field personnel?

A: Yes, they do.

(IV, 365.) In fact, multiple witnesses confirmed that the job description for the Dispatchers at Entergy Gulf States accurately reflects the current job duties and responsibilities for the Dispatchers at EMI. (IV, 69-71, 410-11, 420-29 and V, P. Exs. 72-74.) Like the Dispatchers in *Entergy Gulf States*, those at EMI possess and exercise: the discretion to prioritize repairs in a particular area and move field employees between trouble locations; the responsibility (which is considerable) for safe switching orders and timely power restorations; and the ability to independently decide whether to open an area office and how many workers to call

to duty during an emergency situation. (II, 1109-16; IV, 461-76; *see also Entergy Gulf States*, 253 F.3d at 210-11.) Similarly, the Dispatchers at both affiliated companies independently direct Field Employees after-hours and during emergency situations. (IV, 424-26, 471-72; *see also Entergy Gulf States*, 253 F.3d at 211.) And all Entergy Dispatchers operate without supervision after-hours. (IV, 109-10, 365; *see also Entergy Gulf States*, 253 F.3d at 211). Indeed, because their job duties and functions are identical, the Dispatchers throughout the Entergy system are used interchangeably between subsidiaries in emergency situations. (IV, 70-71.) And senior managers from each of Entergy's subsidiaries meet quarterly to ensure uniformity of operations, including uniformity of functions performed by the Dispatchers. (IV, 368, 426.)

Because the duties and responsibilities of Entergy's Dispatchers at Entergy Gulf States and EMI are not materially different, but, instead, are virtually the same, *Entergy Gulf States* is controlling.

2. *The Entergy Gulf States and Entergy Mississippi cases involve the same legal standards.*

In addition to the factual similarities, the legal standards to be used by this Court are the same as those applied by this Court in *Entergy Gulf States*. In *Entergy Gulf States*, this Court applied the “responsible direction” standard first enunciated in *NLRB v. KDFW-TV, Inc.*, 790 F.2d 1273, 1278 (5th Cir. 1986): “To direct other workers responsibly, a supervisor must be ‘answerable for the

discharge of a duty or obligation’ or accountable for the work product of the employees he directs.” *Id.* at 209, quoting *KDFW-TV*, 790 F.2d at 1278. This Court in *Entergy Gulf States* also recognized that the exercise of technical expertise or judgment qualifies as “independent judgment,” thereby rejecting the Board’s definition of independent judgment from *Mississippi Power & Light Co.* and adopting the Supreme Court’s definition of independent judgment from *NLRB v. Kentucky River Community Care, Inc.*, 532 U.S. 706 (2001). *Id.* at 211. Pursuant to these standards for responsible direction and independent judgment, this Court held that the Dispatchers at Entergy Gulf States qualify as statutory supervisors within the meaning of the NLRA. *Id.*

Importantly, the Board’s subsequent opinion in *Oakwood* did not alter these standards. To the contrary, *Oakwood* strengthened this Court’s precedent. In *Oakwood*, the Board adopted the *same* standard (as used by this Court in *Entergy Gulf States*) for responsible direction and independent judgment, relying, in fact, on the very cases cited by this Court in *Entergy Gulf States*. With reference to responsible direction, the Board in *Oakwood* (like this Court) adopted the standard set forth by the Fifth Circuit in the *KDFW-TV* case:

...the Board rarely has sought to define the parameters of the term “responsibly to direct” . . . The Board majority in *Providence Hospital* concluded that [the circuit] courts endorsed, for the most part, an accountability definition for the word “responsibly” that was consistent with the ordinary meaning of the word. The majority cited

to the Fifth Circuit’s interpretation, *which is set forth in NLRB v. KDFW-TV, Inc., supra, at 1278, as follows:*

“To be responsible is to be answerable for the discharge of a duty or obligation.” . . . In determining whether “direction” in any particular case is responsible, the focus is on whether the alleged supervisor is “held fully accountable and responsible for the performance and work product of the employees” he directs. . . .

The majority in *Providence Hospital*, however, found it unnecessary to pass on the courts’ accountability definition. *We have decided to adopt that definition.*

Oakwood, 348 N.L.R.B. at 691 (subsequent internal citations and references omitted) (emphasis added). And, like this Court in *Entergy Gulf States*, the *Oakwood* Board adopted the Supreme Court’s *Kentucky River* standard for independent judgment, recognizing that the Board’s decision in *Mississippi Power & Light* was overruled:

In *Kentucky River*, the Supreme Court took issue with the Board’s interpretation of “independent judgment” to exclude the exercise of “ordinary professional or technical judgment in directing less skilled employees to deliver services.” . . . Consistent with the [Supreme] Court’s *Kentucky River* decision, we adopt an interpretation of the term “independent judgment” that applies . . . without regard to whether the judgment is exercised using professional or technical expertise.

Oakwood, at 692 (internal citations omitted).

Thus, the Fifth Circuit’s standard for responsible direction and independent judgment, as reaffirmed by the Board in *Oakwood*, still is controlling. As a result,

the legal standard for the case at bar is the *same* as the legal standard already employed by this Court in *Entergy Gulf States*.

3. *Since the facts and law remain unchanged, this Court should adopt its prior analysis from Entergy Gulf States and again hold that Dispatchers are statutory supervisors.*

As this Court has recognized, when neither the facts nor the law has changed with regard to Dispatchers, the result should also be the same: “Because neither the facts nor applicable law has changed since the NLRB declared OC’s [also known as Dispatchers] to be supervisors in 1983, we will not defer to the Board’s attempt to re-characterize them in 1999.” *Entergy Gulf States*, 253 F.3d at 205. Nor should this Court defer to the Board’s latest attempt in 2014-2015 to re-characterize Dispatchers.

In *Entergy Gulf States*, this Court held that Dispatchers responsibly directed Field Employees with independent judgment:

[Dispatchers] still operate without supervision and direct field workers after-hours. They independently decide whether to open up an area office or how many workers initially to call to duty. They have discretion to prioritize repairs in a particular area and move field workers between jobs. Call shifts for field workers do not end until [the Dispatchers] release them. [Dispatchers] have considerable responsibility for safe switching orders and timely power restorations. [Dispatchers] “effectively direct field operations during emergencies and after-hours.” It is simply incorrect to describe the [Dispatchers’] directions to field personnel as an “almost routine or clerical dispatching function.”

Id. at 210-11 (internal and subsequent citations omitted). That analysis is equally applicable to the present case. The Dispatchers at EMI perform the *same* enumerated job duties and direct Field Employees, including, *inter alia*, prioritizing repairs in a particular area, moving Field Employees between jobs, deciding how many workers initially to call to duty, and holding workers until the end of the shift. (II, 1109-12; IV, 459-66.) And the Dispatchers at EMI also are accountable and answerable for the performance of the Field Employees, as measured by the implementation of safe switching orders and timely power restoration. (IV, 115-17, 165-68.) Therefore, pursuant to this Court's (and the Board's) accountability standard from *KDFW-TV* and this Court's (and the Board's) independent judgment standard from *Kentucky River*, the Dispatchers at EMI responsibly direct field employees with independent judgment. As such, they have been – and still are – statutory supervisors. Any decision to the contrary lacks a reasonable basis in the law.²⁶

C. Like This Court, Seven Other Circuit Courts Have Ruled That Dispatchers Are Statutory Supervisors.

As even recognized by the Board majority in the now-discredited *Mississippi Power & Light* case, the job functions of utility-industry Dispatchers

²⁶ Moreover, EMI is a Mississippi company residing in, and doing business exclusively within, the Fifth Circuit's jurisdiction. It thus should follow the law of its Circuit. EMI's compliance with this Court's precedent cannot logically be deemed an unfair labor practice pursuant to the NLRA. Such an outcome surely lacks a reasonable basis in the law.

have a “degree of commonality” from company to company, which warrants treating all Dispatchers similarly for purposes of supervisory status. *MP&L*, 328 N.L.R.B. at 968-69. Nearly all utility companies throughout the nation – including Entergy’s related companies – treat individuals in this job classification as statutory supervisors.²⁷

Significantly, eight federal appeals courts to address this issue – including the First, Third, Fourth, Fifth, Sixth, Seventh, Ninth, and Tenth Circuits – have concluded that utility-industry Dispatchers, just like those at issue in this case, are statutory supervisors.²⁸ Indeed, the only federal appeals court to rule to the contrary did so in an unpublished, two-page, *per curiam* decision with very little

²⁷ In fact, the Dispatchers at EMI are the *only* ones in the entire Entergy system that have yet to be removed from the bargaining unit pursuant to a Board or court decision. (IV, 29-33, 78); *see also Entergy Arkansas*, N.L.R.B. Case No. 26-UC-129; *Entergy Gulf States*, 253 F.3d at 211.

²⁸ Utility-industry Dispatchers have been considered statutory supervisors by this Court and other circuit courts for almost half a century. *See Entergy Gulf States*, 253 F.3d at 211 (denying enforcement of *Entergy Gulf States, Inc.*, 330 N.L.R.B. No. 196 (2000)); *see also West Penn Power Co. v. NLRB*, 337 F.2d 993 (3rd Cir. 1964) (denying enforcement of *West Penn Power Co.*, 143 N.L.R.B. 1316 (1963)); *Ariz. Pub. Serv. Co. v. NLRB*, 453 F.2d 228 (9th Cir. 1971) (denying enforcement of *Ariz. Pub. Serv. Co.*, 188 N.L.R.B. No. 1 (1970)); *NLRB v. Detroit Edison Co.*, 537 F.2d 239, 243 (6th Cir. 1976) (denying enforcement of *Detroit Edison Co.*, 216 N.L.R.B. 1022 (1975), and finding Dispatchers responsibly direct by issuing thousands of instructions directly to field personnel and utilizing independent judgment as preexisting operating procedures do not exist for “every possible contingency”); *Maine Yankee Atomic Power Co. v. NLRB*, 624 F.2d 347 (1st Cir. 1980) (denying enforcement of *Maine Yankee Atomic Power Co.*, 243 N.L.R.B. 319 (1979), and finding the Dispatchers were empowered to direct field employees assigned to a particular shift); *Southern Ind. Gas & Elec. Co. v. NLRB*, 657 F.2d 878, 884 (7th Cir. 1981) (denying enforcement of *Southern Ind. Gas & Elec. Co.*, 249 N.L.R.B. 252 (1980), and finding field employees are “totally dependent upon the [Dispatchers] to guide them safely through their work”); *Monongahela Power Co. v. NLRB*, 657 F.2d 608 (4th Cir. 1981) (denying enforcement of *Monongahela Power Co.*, 252 N.L.R.B. 715 (1980)); *Pub. Serv. Co. of Col. v. NLRB*, 271 F.3d 1213 (10th Cir. 2001) (denying enforcement of *Pub. Serv. Co. of Col.*, 331 N.L.R.B. No. 48 (2000)).

analysis. *See Avista Corp., v. NLRB*, No. 11-1397, 2013 U.S. App LEXIS 1377 (D.C. Cir. Jan. 18, 2013). The agreement of the appeals courts is not only compelling and in stark contrast to the Board's vacillating history, but it also is further evidence that the Board's order at issue in this appeal has no reasonable legal basis and should be rejected.

II. The Board's Decision That Dispatchers Are Bargaining-Unit Employees Is Not Supported by Substantial Evidence.

Because the Board's decision does not have a reasonable basis in the law, this Court may properly stop its analysis and deny enforcement of the Board's Order of October 31, 2014. But even if this case were to proceed and turn on an in-depth review of the particular facts, the evidence also clearly establishes that Dispatchers are statutory supervisors because they use independent judgment to responsibly direct Field Employees (precisely as this Court already found in nearly identical factual circumstances in *Entergy Gulf States*) and also to assign work to Field Employees. (I, 177-79; IV, 167, 339, 375-77, 491.) The Board's decision to the contrary represents a strained effort to conform to the Board majority's unyielding determination that more first-echelon supervisors should be eligible for union membership. Accordingly, this Court should deny enforcement of the Board's Order. *See* 29 U.S.C. §§ 160(e) and (f) (stating that the Board's factual findings must be supported by substantial evidence on the record as a whole); *Selkirk Metalbestos, N.A., Elger Mfg., Inc. v. NLRB*, 116 F.3d 782, 786 (5th Cir. 2431537-1

1997) (“This court reviews the NLRB’s factual determinations for substantial evidence.”) (citations omitted).

A. A Heightened Standard of Review Applies to this Case.

This Court should apply the standard of review set forth in Section I(A), *supra*, at pages 13-16.

B. This Court Should Reject the Board’s Results-Driven Approach.

For several decades, the Board has tried numerous tactics to administratively limit the Act’s definition of “supervisor.” The Board originally sought to limit the supervisory classification by claiming that certain job duties were not performed “in the interests of their employer.” These arguments were unsuccessful. *See, e.g., Health Care & Ret. Corp. of Am.*, 511 U.S. at 577. As a result, the Board changed its strategy and contended that independent judgment did not include professional judgment. *See, e.g., Miss. Power & Light*, 328 N.L.R.B. at 970. But the Supreme Court explicitly rejected this attempt to limit the supervisor classification. *Ky. River Cmty. Care*, 532 U.S. at 706. Given these failures, certain members of Congress proposed the so-called “Respect Act” (multiple times), which seeks to legislatively limit the definition of “supervisor” to exclude the activities of assignment and responsible direction. (*See, e.g., HR. 1644*, 110th Cong. (2007); S.

2168, 112th Cong. (2012)). These bills have failed to gain traction.²⁹

Indeed, as evidence of the Board's blatant effort to achieve a predetermined outcome in this case and others, it is worth noting that the Board has analyzed supervisory status pursuant to the *Oakwood* standard 67 times since 2006 and failed to find supervisory status in 61 of those cases. And in the six times that the Board applied *Oakwood* and found supervisory status, the Board still ruled against the employer.³⁰ (See Appendix A, "NLRB Supervisory Decisions Based Upon *Oakwood Healthcare, Inc.*"). In sum, *no employer has ever won* a supervisory case before the Board since 2006. In contrast, in the 169 cases prior to *Oakwood* in which the Board analyzed supervisory status, the Board found supervisory status 58 times. (See Appendix B, "NLRB Supervisory Decisions Prior to *Oakwood Healthcare, Inc.*"). Given this obvious results-driven agenda, the Board herein not surprisingly found that Dispatchers did not assign or responsibly direct as required to qualify as statutory supervisors. As explained herein, the Board ignored and distorted the evidence in order to achieve this predetermined result.

²⁹ It is indeed ironic that both the "Respect Act" and the *Entergy Mississippi* decision urge a viewpoint advanced by Member Becker (the subsequent recess appointee who was part of the two-member majority in *Entergy Mississippi*) in law review articles that he drafted *prior to* his appointment to the Board, urging for a more expansive view of supervisory status in an effort to manipulate the reach of the National Labor Relations Act. See Craig Becker & Diana Drantes Ceresi, Toward a Rational Interpretation of the Term "Supervisor" after *Kentucky River*, 18 The Labor Lawyer No. 3, p. 385 (2003).

³⁰ And, not surprisingly, in each of these decisions, the Board also found that the employer committed an unfair labor practice.

C. The Board’s Decision That Dispatchers Do Not “Responsibly Direct”
Field Employees Is Contrary to the Record Evidence.

Both the Board and the Regional Director recognized (and it cannot legitimately be disputed) that Dispatchers “direct” Field Employees in the execution of switching orders.³¹ (VI, 1133; VII, 1925.) But the Board found that this direction was not “responsible” because the Dispatchers purportedly were not accountable for the actions of the Field Employees. (VII, 1929-30.) In reaching this conclusion, the Board blatantly disregarded the evidence presented by EMI (as well as this Court’s prior *Entergy Gulf States* opinion) and, instead, narrowly focused on whether Dispatchers were disciplined as a result of Field Employee errors. (VII, 1930-31.)³²

As explained *supra*,³³ the Board herein used the same “accountability” standard for responsible direction as this Court used in *Entergy Gulf States*: direction is responsible if the putative supervisor is “answerable for the discharge

³¹ In particular, Dispatchers direct Field Employees in every step that must be undertaken to resolve a trouble situation. Initially, the Dispatcher instructs the Field Employee where to go and what to look for at a trouble location. (IV, 462.) Thereafter, the Dispatcher instructs the Field Employee in each step of the Switching Order (many of which involve multiple Field Employees simultaneously performing work in different geographical areas), which is drafted at the exclusive discretion of the Dispatcher. (IV, 485-86.) In fact, a Field Employee is not permitted to commence any work until receiving prior authorization from the Dispatcher and cannot stop work until released by the Dispatcher. (IV, 153, 484-85.)

³² The Board’s decision was a 2-1 opinion, which included a strong dissent from Member Hayes wherein he found that Dispatchers use independent judgment to both assign and responsibly direct Field Employees. (VII, 1933-36.)

³³ See Section I(B)(2), at pp. 19-22.

of a duty or obligation or accountable for the work product of the employees he directs.” *Entergy Gulf States*, 253 F.3d at 209 (internal and subsequent citations omitted); *see also Oakwood*, 348 N.L.R.B. at 691-92. Accountability is not limited to formal discipline because of Field Employee errors. To the contrary, accountability includes *any adverse consequence* because of the failure of the putative supervisor and the employees that he or she directs to achieve the employer’s goals. *See Croft Metals, Inc.*, 348 N.L.R.B. 717, 722 (2006) (recognizing that lead persons were statutory supervisors because they received adverse consequences for their and their crew’s failure to meet employer’s production goals). Pursuant to this exact standard, this Court held that Entergy’s Dispatchers in Louisiana and Texas were supervisors because they had “considerable responsibility for safe switching orders and timely power restoration.” *Entergy Gulf States*, 253 F.3d at 211. Entergy’s Dispatchers in Mississippi *similarly* are accountable for safe switching orders and timely power restoration; so this Court should follow its precedent and reject the Board’s reasoning, which is not supported by substantial evidence – all as more thoroughly explained herein.

1. Dispatchers are accountable for safe switching orders.

Since the Dispatchers are the “controlling authority” in the switching process, the record contains numerous examples of Dispatchers immediately

reacting and correcting Field Employee errors during switching. (IV, 183-85, 189-90, 193-94, 322-25.) For example, John Scott (Manager of the Distribution Operations Center) testified of an incident where the Dispatcher realized that the troubleman that he was directing opened the wrong device in executing the Dispatcher's switching order and tied two energized circuits together (at great risk to both persons and property); the Dispatcher immediately corrected the Field Employee's performance, directing him to the proper device. (IV, 183-85.) Similarly, John Scott testified about another incident where the crew that a Dispatcher was directing turned off the incorrect relay scheme, resulting in a power outage to a major customer. The Dispatcher realized the Field Employees' error and directed them through another switching order to restore power (IV, 198-209). In each of these situations, the Dispatcher immediately corrected the Field Employee's performance to ensure a safe and efficient switching process, as well as the continued transmission of power, by either drafting a contingency switching order or by directing the Field Employee to take other corrective actions. (*Id.*) This evidences the Dispatcher's overall accountability for the switching process.

Moreover, the record includes numerous examples where Dispatchers are disciplined for their failure to effectively direct Field Employees in the switching process or in responding to trouble situations. (IV, 202-04, 245-46, 312-36, 389-98, 444-47.) And the record contains numerous situations in which Dispatchers

were disciplined *solely* because of errors made by Field Employees under their supervision – a fact that is directly contrary to the Board’s finding that Dispatchers are not held accountable or disciplined if Field Employees perform their jobs poorly. (VII, 1929.) For example, witness Duane Sistrunk testified that a Dispatcher received counseling even though the Switching Order he drafted was correct and the sole error was attributable to the Field Employee.³⁴ (IV, 322-26.) In other examples, Dispatchers were counseled after a switching error – even though it was Field Employees who failed to observe and stop the errors. (IV, 165, 312-19.) As the Board noted in *Golden Crest*, such counseling is sufficient to establish that a putative supervisor is accountable under the *KDFW-TV* standard adopted by this Court and the Board. 348 N.L.R.B. at 731, n.13 (“Such an effect may be ... some form of counseling or discipline”).

³⁴ The Board majority denied the relevance of this evidence in part because the Dispatcher’s personnel file did not contain evidence of the discipline. However, as the Board has previously recognized, an “adverse consequence” is not limited to written discipline. *See Beverly Enterps.-Minn., Inc., d/b/a/ Golden Crest Healthcare Ctr.* (“*Golden Crest*”), 348 N.L.R.B. 727, 731 (2006) (recognizing that even a negative evaluation by a supervisor can qualify as “adverse consequences” for purposes of responsible direction, so long as there is the prospect of positive or negative ramifications resulting from the evaluation). Moreover, the Eleventh Circuit Court of Appeals has specifically held that evidence of discipline is *not* required to establish responsible direction; to the contrary, there merely needs to be the *prospect* of such adverse consequences, even if never implemented. *See Lakeland Healthcare Assocs., L.L.C. v. NLRB*, 696 F.3d 1332, 1344 (11th Cir. 2012).

2. *Dispatchers also are accountable for the safe and efficient restoration of power.*

Like Entergy's Dispatchers in Texas and Louisiana, the Dispatchers at EMI can be disciplined and receive negative evaluations as a result of their and their team's failure to meet Entergy's production goals related to the safe and efficient restoration of power – whether these failures are caused by their own performance *or* the performance of the Field Employees they direct. (IV, 157-160.) Indeed, in accordance with *Entergy Gulf States* and *Oakwood*, the Dispatchers ultimately are the answerable party for the safe and timely restoration of power. This compelling evidence was ignored by the Board, even though it is directly relevant to the Dispatchers' "responsible" direction.

Accountability is satisfied if a putative supervisor experiences positive or negative consequences as a result of his crew's performance in achieving employer-provided goals. In *Croft Metals, Inc.*, the Board concluded that lead persons at a manufacturing plant were accountable because they suffered adverse consequences as a result of their crew's failure to meet production goals. 348 N.L.R.B. at 722. The Board specifically noted that lead persons "instruct employees how to perform jobs properly, and tell employees what to load first on a truck or what jobs to run first on a line to ensure that orders are filled and production completed in a timely manner." *Id.* These lead persons could be subject to adverse consequences for their failure to perform these duties or for their

crew's failure to achieve the employer goals (for example, if the crew takes too long to load the trucks or if the leadman fails to promptly direct the crew to correct a problem). *Id.* Accountability did not require that the leadman be disciplined for his employee's actual errors, so long as he faced consequences as a result of the performance of his crew as a whole. Thus, the Board found that the lead persons were accountable – and responsibly directed their crew members. *Id.*

EMI presented substantial and uncontroverted evidence to establish Dispatchers' accountability pursuant to this same standard. John Scott (Distribution Dispatcher Supervisor) testified that he issued a collective warning to his Dispatchers when their crews' power restoration times lagged behind those of other networks. (IV, 157-60.) He further warned the Dispatchers that if these times did not improve (regardless of the cause), additional discipline would be levied on individual Dispatchers. (*Id.*) In another incident, a Dispatcher was held accountable for failing to properly assign enough Field Employees to a trouble spot, resulting in a lengthy power outage. (IV, 312-15.) And in another example, a Dispatcher was held accountable when, during the switching process, a Field Employee improperly switched out an operating bus, which resulted in a loss of power. (IV, 316-18). Though both the Dispatcher and the Field Employee committed errors leading to this incident (for improperly directing a Field Employee to switch out an operating bus and for failing to review the order or

confirm the configuration of the power system, respectively), *only* the Dispatcher was held accountable for the resulting loss of power. (*Id.*) In yet another incident, a Dispatcher was counseled for an incident where a Field Employee made an error resulting in a power outage. (IV, 322-25.) As evidenced by all of the foregoing, Dispatchers – like the leadmen in *Croft Metals* – are accountable for achieving EMI’s production goals related to the safe and efficient restoration of power.

Moreover, Dispatchers in the Entergy system are evaluated based on the “PPR” Performance Planning and Review system, which considers the effectiveness and efficiency of the power restoration managed by each Dispatcher. (IV, 40-41, 220-26, 306-07, 378-93, 439-41.) Dispatchers who perform better, by more safely and efficiently restoring power and directing Field Employees through the switching process, receive larger salary increases and bonuses. (IV, 404-07, 447-50.) And Dispatchers who have unacceptable power restoration times – regardless of the reason (whether because of their own performance or the Field Employees’ performance) – receive less compensation. (IV, 382-87, 441-47.) “Although *Oakwood* states that there must be a prospect of adverse consequences for failing, the Board’s companion decision in *Golden Crest* makes clear that a prospect of positive consequences for succeeding is also sufficient to establish accountability.” *Woodman’s Food Mkt., Inc.*, 359 N.L.R.B. No. 114, at *8 n.18 (2013) (subsequent citations omitted). The Board failed to even consider this

evidence. *And yet nothing more is necessary to establish Dispatchers’ “responsible” direction.*

Finally, in analyzing responsible direction, it is worth noting that the Board, in its Decision on Review (VII, 1925-32), failed to even consider whether the interests of the Dispatchers align with those of management. *Oakwood* makes clear, however, that this is directly relevant to determining whether direction is responsible:

The [responsible-direction framework] creates a distinction between “those employees whose interests, in directing other employees’ tasks, align with management, from those whose interests, in directing other employees, are simply the completion of a certain task. In the case of the former, . . . the directing employee will have, if and to the extent necessary, an adversarial relationship with those he is directing.

Oakwood, 348 N.L.R.B. at 692; *see also Lakeland*, 696, F.3d at 1346 (“Applying the framework of *Oakwood*, we conclude that the record as a whole establishes that the [purported supervisors’] interests are ‘aligned with management’ and that the [purported supervisors] would be held accountable for the poor performance of [the employees they purportedly supervise]”).

EMI presented uncontradicted evidence that Field Employees are often disciplined as a result of the Dispatchers’ determination that the employees failed to properly perform. For example:

- A troubleman was disciplined after a Dispatcher reported that he opened the wrong devices during the switching process. (IV, 183-89.)

- Two Field Employees were disciplined after a Dispatcher reported that they deviated from the echo protocol by opening switches prior to the Dispatcher's instructions. (IV, 193-95.)
- Field Employees were counseled after Dispatchers reported that they failed to answer telephone calls, which slowed down the Dispatchers' ability to respond to trouble situations. (IV, 229-31.)
- A switchman was counseled after a Dispatcher reported that he forgot to bring his rubber gloves to work. (IV, 354-55.)

As evidenced by the foregoing, the relationship between Dispatchers and Field Employees can be adversarial in nature because Dispatchers' interests are aligned with management. The Board should have considered this evidence and erred in failing to do so.

In sum, the Board found that the Dispatchers at EMI were not accountable and, thus, not responsible for the Field Employees that they direct. But in making that determination, the Board narrowly focused on the claim that Dispatchers were not *disciplined* because of mistakes by Field Employees. The Board's conclusion herein is directly contrary to the record evidence and fails to consider the numerous other ways in which Dispatchers are "accountable," including through the adverse consequences that they experience as a result of their crew's failure to safely and timely restore power or the positive consequences that they receive for the timely

restoration of power. “The Board cannot ignore relevant evidence that detracts from its findings. When [it] misconstrues or fails to consider important evidence, its conclusions are less likely to rest upon substantial evidence.” *Lakeland*, 696 F.3d at 1335 (subsequent and internal citations omitted). As such, the Board’s order should not be enforced by this Court because, just as in *Entergy Gulf States*, it is not based upon substantial record evidence.

D. The Board’s Decision That Dispatchers Do Not “Assign” Field Employees Also Is Contrary to the Record Evidence.

In addition to responsibly directing Field Employees, the record evidence establishes that Dispatchers exercise supervisory authority in their assignment of Field Employees.³⁵ The *Oakwood* Board defined assign as:

[T]he act of designating an employee to a place (such as a location, department or wing), appointing an employee to a time (such as a shift or overtime period) or giving significant overall duties, i.e. tasks, to an employee. That is, the place, time, and work of an employee are part of his/her terms and conditions of employment.

The assignment of an employee to a certain department (e.g., housewares) or to a certain shift (e.g., night) or to certain significant overall tasks (e.g., restocking shelves) would generally qualify as ‘assign’ within our construction. However, choosing the order in which the employee will perform discrete tasks within those

³⁵ Because this Court found that Dispatchers at Entergy Gulf States exercised supervisory authority in their responsible direction of Field Employees, it did not consider whether Dispatchers also exercise supervisory authority in their assignment of Field Employees. *Entergy Gulf States*, 253 F.3d at 211.

assignments (e.g., restocking toasters before coffeemakers) would not be indicative of exercising the authority to ‘assign.’ ... In sum, to ‘assign’ for purposes of Section 2(11) refers to the [supervisor’s] designation of significant overall duties to an employee, not the supervisor’s ad hoc instruction that the employee perform a discrete task.

Oakwood, 348 N.L.R.B. at 689. This is a simple disjunctive test: if an individual assigns an employee either to a place, to a time, or to significant overall tasks, then he or she is a supervisor (so long, of course, as the assignment is done with independent judgment). *Id.*

In its decision, the Board concluded that the Dispatchers at EMI do not assign Field Employees to a time or significant overall duties. And though the Board concluded that the Dispatchers assigned Field Employees to a place, the Board claimed that this assignment lacked independent judgment. (VII, 1931-32.) The record evidence, however, plainly demonstrates that Dispatchers use independent judgment in assigning Field Employees to a time, to a place, and to significant overall duties. (I, 775-815; III, P. Exs. 48, 49.)³⁶ As such, the Board’s opinion belies the overwhelming weight of factual evidence in this case and should not be enforced.

³⁶ These citations are to important testimony and evidence relating to the complex judgments and decisions that the Dispatchers make in their assignment and responsible direction of Field Employees, and are relevant record citations throughout Sections II(C)(1) – II(C)(2), *supra*, pages 29-37, and Sections II(D)(1) – II(D)(3), *infra*, pages 37-43.

1. *Assignment of overtime work to Field Employees.*

The Board majority conceded (and it cannot legitimately be disputed) that Dispatchers have the authority to assign overtime to Field Employees during outage situations. (VII, 1931.) But the Board concluded that this exercise of power does not qualify as an “assignment” pursuant to the NLRA because Dispatchers purportedly cannot *require* Field Employees to work overtime. (*Id.*) This conclusion is directly contrary to the record evidence.

Both John Scott (the supervisor for the Distribution Dispatchers) and William McCorkle (a former Dispatcher) testified that Dispatchers can *require* Field Employees to remain on the job after the conclusion of their shifts to work outage overtime.³⁷ Specifically, Scott testified that “absent a major personal emergency” Dispatchers can require Field Employees to work outage overtime. (IV, 241.) McCorkle’s testimony similarly confirms the Dispatchers’ authority:

Hearing Officer Dorman: But I was just wondering, because if you know you get off, and [the Dispatcher] can’t find anybody who can replace you, what gives – what gives you the authority – you know, what makes you believe [the Dispatcher] has the authority to make

³⁷ “Outage overtime” refers to a Dispatcher directing a Field Employee to extend his or her shift in order to respond to a trouble situation. In contrast, “call-out overtime” refers to a situation where a Dispatcher (or another supervisor) contacts a Field Employee off-hours and off-shift requesting that the employee work overtime. Pursuant to the terms of the parties’ collective-bargaining agreement, it is undisputed that neither Dispatchers – nor any other supervisor – can require Field Employees to work call-out overtime. (I, 771-73; IV, 238-40.) This is irrelevant to the present analysis, however, regarding whether Dispatchers can require Field Employees to work *outage* overtime.

you stay, that you can't go, that you can't leave because your shift is over?

The Witness: Well, I'm going to work it, and *he has the authority to tell me to work it.*

Hearing Officer Dorman: And what do you think he might do to you if you leave?

The Witness: I could be subject to discipline.

(IV, 467.) Indeed, failure to follow the direction of a Dispatcher is considered insubordination. (IV, 117, 193-95; V, P.Ex.38.) Moreover, though the Board majority attempted to discount this clear and undisputed testimony by claiming that EMI failed to present any evidence of occasions when Field Employees actually were required to work overtime by Dispatchers (VII, 1931-32), McCorkle specifically testified that he had been required by a Dispatcher to work outage overtime, even after he had requested to be relieved. (IV, 466-69.)

Contrary to the Board's claims, the record evidence is not "speculative" or "lacking in specificity." (VII, 1931.) *Multiple witnesses unequivocally testified that Dispatchers can require Field Employees to work outage overtime. (See, e.g., II, 1109-16; IV, 241, 365, 410-11, 462, 465-67, 471-72.)* The Board mischaracterized and ignored this evidence, and as a result, its conclusion that Dispatchers cannot assign outage overtime is not supported by substantial evidence.

2. *Assignment of Field Employees to significant overall tasks.*

The Board majority also concedes that Dispatchers assign Field Employees to handle trouble situations and power outages. (VII, 1931.) The Board denies, however, that this qualifies as an assignment of “significant overall duties” within the meaning of the NLRA, equating the Dispatchers’ assignment of Field Employees to trouble situations with the assignment of “restocking toasters before coffeemakers [discussed in *Oakwood*].” (VII, 1932.) The Board further claims – without explanation or citation to authorities – that the Dispatchers’ assignment of duties to Field Employees is merely “*ad hoc* instruction.” (VII, 1932.) This “analysis” is based on a complete distortion of the record evidence for the sole purpose of achieving a predetermined outcome.

In concluding that Dispatchers do not assign significant overall duties, the Board ignored the following unrefuted evidence:

- The Dispatchers so-called “*ad hoc* instruction” of Field Employees typically accounts for 30-50 percent of the Field Employees’ work. (VII, 1935.)
- When Dispatchers assign Field Employees to trouble situations, they remove these employees from their “normal” tasks (which are primarily based on the performance of routine maintenance orders) and reassign them to completely distinct tasks, which require the

Field Employees to provide information about the conditions and locations of the trouble; execute the steps in a switching order to direct, redirect, or isolate electrical power; repair damaged equipment; and submit information about an outage's cause and duration. (IV, 339, 459-61, 470.)

- The Dispatchers assign Field Employees with significant overall tasks relative to an individual switching order, some of which take several hours to complete based on the work of numerous Field Employees in various geographic locations. (IV, 485-88, 491.)

The Dispatchers' emergency assignment of Field Employees to restore power outages and execute all or a part of switching orders is certainly as significant (to say the least) as the assignment of "stocking a shelf," which the Board recognized to be the assignment of a discrete overall task sufficient to confer supervisory status. *Oakwood*, 348 N.L.R.B. at 689. Accordingly, the Board's decision to the contrary should be rejected.

3. *Assignment of Field Employees to a place.*

The record evidence clearly establishes that when a trouble situation arises, the Dispatcher determines the geographical location of the problem and assigns the Field Employee to that location. (I, 775-89; III, P. Ex. 48; IV, 236-37, 460, 484.) Thereafter, the Dispatcher has the authority to continue to assign the Field

Employee to other locations. (IV, 241-42, 461-62.) Thus, even the Board majority recognized (and it cannot be legitimately disputed) that Dispatchers assign Field Employees to a “place” within the meaning of the Act.³⁸ (VII, 1931.)

E. The Dispatchers Use Independent Judgment When Assigning and Responsibly Directing Field Employees.

Because the Board concluded that Dispatchers do not responsibly direct or assign significant overall duties or times to Field Employees, the Board failed to even consider whether Dispatchers utilize independent judgment in the exercise of these supervisory duties. The record evidence establishes that they do. Moreover, the Board’s unsupported conclusion that Dispatchers do not use independent judgment in their assignment of Field Employees to a place is based on a gross oversimplification of the evidence. (VII, 1931-32.)

As noted *supra*, an individual is a statutory supervisor pursuant to the NLRA if he or she engages in any one of the 12 enumerated supervisory functions, and “the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.” 29 U.S.C. 152(11). Pursuant to the Supreme Court’s opinion in *Kentucky River Community Care*, ordinary

³⁸ The Board claimed, however, that Dispatchers did not exercise the requisite independent judgment in making these assignments. (VII, 1931.) As explained *infra*, this conclusion is not supported by the record evidence. (See Section II(D)(2), *infra*, at pp. 41-42.)

professional or technical judgment qualifies as independent judgment, so long as it is of the requisite degree and not merely “routine or clerical.” 532 U.S. at 713.

The evidence clearly establishes that Dispatchers make numerous independent judgments in assigning and responsibly directing Field Employees. (I, 79, 92-94; IV, 108-09, 167, 458-63, 489-91.) These supervisory judgments are critical and require a meaningful exercise of discretion, as the Dispatchers continuously evaluate unique circumstances to make decisions that could have the most serious of consequences (including preservation of life and property and grievous economic damages). (IV, 326-28, 374-77, 479-80.) Assignment and direction with these ramifications necessarily are supervisory – as more thoroughly explained and supported herein – and the Board’s conclusion to the contrary is not based on substantial evidence.

1. The Dispatchers exercise independent judgment in their responsible direction of Field Employees.

The Dispatchers must make numerous judgments in their responsible direction of Field Employees, particularly in drafting switching orders and directing employees through the switching process. (I, 79-80; IV, 483-86.) In directing employees through switching, the Dispatcher considers, *inter alia*, whether he or she will direct one Field Employee or several Field Employees to partially or fully restore power; whether different types of Field Employees are needed to address the trouble; and whether a clearance order is required prior to

beginning switching. (I, 790-815; III, P.Ex. 49; IV, 106-09, 486-88; V, P.Ex.12.) The Dispatcher also considers the scope of the potential outage, the number and type of customers affected, the potential duration of the outage, the available personnel to assist (including the location, number and type of employees available), the quickest and safest method to restore power, the order to restore power to customers, the load considerations, and the potential impact of performing the work on non-affected customers. (IV, 106, 241-42, 249-50, 269-77, 481-82.) These numerous and complex judgments factor into each Switching Order drafted by the Dispatcher, which then guides the responsible direction of Field Employees in the execution of the Order.

Notably, the Region's initial determination that Dispatchers did not exercise independent judgment in their direction of Field Employees relied heavily on the existence of company manuals and procedures. (VII, 1927.) In that vein, the Unions previously contended that Dispatchers do not exercise independent judgment because EMI has general policy manuals addressing switching. (VI, 647, 999-1000, 1006.) However, as the Board itself has recognized, "the mere existence of company policies does not eliminate independent judgment from decision-making if the policies allow for discretionary choice." *Oakwood*, 348 N.L.R.B. at 693. And here, although manuals and policies exist (as is true in all utilities in this country), the record evidence makes clear that virtually every

decision made by a Dispatcher still requires the exercise of independent judgment and provides the Dispatcher with the requisite discretionary options. (IV, 93-95.)

Indeed, as witness Scott testified without contradiction, EMI's manuals are similar to the "owners' manual" of a stove:

I guess I would equate the [Dispatcher Training] manual to like if you go and buy a stove, and you've got an owner's manual with the stove. It may show you where the on switch is, but it don't tell you what temperature to put the oven on. It doesn't tell you what to put in the oven. It doesn't tell you what ingredients to make the pie. It doesn't tell you all those things of what to do. It just is a simple, how to turn the stove on, so all the decision-making is not involved in the manual.

So that manual is there, but it really does not do them any good either. They've got a comprehension of the skills and the information needed or they don't....

[The Dispatcher Training Manual] does not tell you what to switch. It doesn't tell you where to switch. It doesn't tell you what can be switched. It doesn't give you the current situation on the system, what the current voltages are, what's currently in service, what's out of service. It doesn't tell you what personnel you have to have with you to work with at that time, whether it's substation personnel or line personnel or trouble personnel. It doesn't tell you what loads are available, from what sources, so there's all kinds of the variables it does not tell you....

[The Switching, Tagging and Clearance Procedures] don't tell you, again, what to switch, where to switch, where the capacity is in the system that I can switch to. It does not tell you how the system's currently configured. It doesn't tell you what's actually energized right now. It doesn't tell you what's actually de-energized right now. It doesn't tell you where any of the switches are that need to be switched. It does not tell you any of the capacity in the substations. It does not tell you voltage that's currently on the system at this time. It does not tell you anything with regard to what the settings are on the relays where the protection schemes are, what type of protection

scheme is being used in this particular station, so it doesn't give you any of that information.

(IV, 93-94; *see also* IV, 108-09.)

Scott's testimony is fully consistent with the decisions of nearly every circuit court to consider this issue, which recognize (i) that Dispatchers exercise independent judgment in responsibly directing Field Employees in the tasks that are required to respond to electrical outages and (ii) that manuals or policies do not diminish the nature of these supervisory judgments. *See Pub. Serv. Co. of Col.*, 271 F.3d at 1216 (“[t]here are no manuals laying out detailed orders as to how they are to design switching orders or carry out their other tasks....Rather, [Dispatchers] are expected to use their judgment, experience, and training to devise solutions to complex and often novel problems that they face.”); *Southern Ind. Gas*, 657 F.2d at 885 (“We find the existence of written guidelines regarding switching operations insufficient to deprive the systems supervisors of supervisory status.”); *Maine Yankee Atomic Power Co.*, 624 F.2d at 362-63 (1st Cir. 1980) (“And further, even were we to assume that written guidelines could somewhere be found to cover virtually every eventuality, we do not think that this would demonstrate that independent judgment is not exercised by a [dispatcher] in directing the [field employees] in the performance of their required tasks.”).

Indeed, the decisions that Dispatchers are required to make are less constrained by policy than the Board's example in *Oakwood* involving a hospital

policy detailing how a charge nurse should respond in an emergency. *Oakwood*, 348 N.L.R.B. at 715. There, the Board noted that while the nurse's reaction might be circumscribed, as long as the charge nurse retained the discretion to determine when the emergency exists, then he or she was exercising supervisory independent judgment. *Id.* at 693-94. Here, not only do the Dispatchers have the ability to determine if an emergency exists, but they also have the discretion and responsibility to decide how, who, when and *if* to respond to it. In short, the Dispatchers' decisions, as recognized by the courts and the Board, are made through the exercise of meaningful judgment.

2. *The Dispatchers also exercise independent judgment in their assignment of Field Employees to a time, to a place, and to significant overall duties.*

The Board, in its decision, claimed that Dispatchers lacked independent judgment in their assignment of Field Employees to trouble situations (i.e. to a place): "Because the Dispatchers utilize a computer program that notifies them of trouble spot locations, and *usually* assign to trouble spots employees already assigned to that specific area, the Dispatchers do not exercise independent judgment in assigning employees [to a place]." (VII, 1931, emphasis added.) In its decision, the Board failed to even consider the Dispatchers' exercise of independent judgment in assigning Field Employees to a time or to significant overall duties. (VII, 1931-32.) The Board majority's conclusion is, yet again, a

gross oversimplification of the record. The evidence establishes that Dispatchers make significant judgments – above the routine or clerical – in assigning Field Employees to overtime, to trouble situations, and to overall duties. (II, 872-73, 1121-22; IV, 70, 109-10, 249-50, 410-11, 460-62, 483-85.)

With reference to assignment of Field Employees to a place (and the corresponding assignment of overall duties), in the “simple” examples presented by the Board majority wherein a Dispatcher purportedly assigns a Field Employee to the *only* trouble situation in an area (VII, 1931), the Dispatcher still makes numerous judgments: whether to send an employee to immediately address the situation (instead of waiting to resolve the problem through scheduled system maintenance); what specific tasks the employee needs to perform to resolve the situation; the type of employee to send to address the situation in view of the specific trouble; the number of employees to be sent; and when each employee should be sent. (I, 775-815; II, 1108-16.) This “simple” example is rarely the reality, however. Indeed, the Board majority seized upon the exception rather than the rule as a means of supporting its desired conclusion – not the conclusion compelled by the far greater weight of record evidence.

The Dispatchers at EMI operate in a dynamic environment with numerous unplanned contingencies in several different areas (often as a result of weather issues). (II, 872-73, 1109-16; IV, 243-45, 293-300, 460-76.) The choices that

Dispatchers must make in these situations are even more complex and implicate greater judgments than the “simple” situation posited by the Board, including: which trouble situation should be addressed first; whether several trouble situations can be dealt with simultaneously; whether a crew currently working on a problem should be reassigned to a different, more critical trouble situation; whether the Dispatcher should call out additional personnel. Moreover, the Dispatcher also must make a judgment as to whether he or she should hold over existing personnel, thereby obligating EMI to pay overtime. (*Id*; see also I, 775-815; III, P.Exs. 48, 49; IV, 410-11.) In these situations, the evidence clearly establishes that the Dispatcher does not just receive a notice via an alarm and direct the Field Employee already working in the area to that one situation. Rather, the Dispatcher receives innumerable alarms and has to make judgments regarding which alarms to address and, importantly, how to best use the available resources to do so. (*Id*; see also II, 1108-16; IV, 269-74.) Once assigned to a place, the Dispatcher then decides what a Field Employee needs to do to restore power or alleviate the emergency. (*Id*; see also I, 177-79; IV, 240-42.) The record contains numerous examples of Dispatchers in these situations, wherein a Dispatcher exercised judgment based on professional experience to direct Field Employees to more pressing matters or made determinations as to what problems needed to be immediately corrected. (IV, 460-62, 480-82.) For example, witness Fabre testified

about a situation where there was a large outage, and a Dispatcher decided to restore power to certain residential customers prior to a chemical plant. The chemical plant complained about the delay in its power restoration, but Fabre confirmed that it was within the Dispatcher's sole judgment to determine how to prioritize the restoration of power. (IV, 374-78.) Even the Union's Business Manager admitted that a Dispatcher has to "[use] a lot of information to make his decisions" regarding the assignment of an employee to a place (and the corresponding assignment of overall duties) when there are multiple cases of trouble. (II, 1112.)

The Board majority likewise concedes that Dispatchers do not always assign Field Employees based on their current geographic locations (instead, the Board claims that they "usually" do). (VII, 1931.) Nevertheless, the Board's opinion fails to consider – much less analyze – whether Dispatchers exercise independent judgment in making these out-of-network assignments when there are numerous or pressing trouble situations. (IV, 241-42, 460-62, 486.)

Given all of the foregoing, the record is clear: Dispatchers exercise independent judgment in their assignment and responsible direction of Field Employees and, thus, are statutory supervisors. The Board's contrary decision is not based on substantial evidence. As such, this Court should deny enforcement of the Board's order.

F. In Addition to Their Assignment and Responsible Direction of Field Employees, Dispatchers Possess Other Indicia of Supervisory Status.

As this Court has previously recognized, secondary indicia of authority also are relevant to the determination of supervisory status. *See Entergy Gulf States*, 253 F.3d at 209; *Poly-Am., Inc. v. NLRB*, 260 F.3d 465, 479 (5th Cir. 2001). Here, an analysis of such secondary indicia further buttresses the conclusion that Dispatchers are supervisors.

In contrast to Field Employees and other bargaining-unit members, Dispatchers operate with minimal day-to-day supervision. (IV, 109-10, 293-98.) They prepare their schedules and determine their vacations. (*Id.*) They authorize their own overtime and have the authority to call in fellow Dispatchers for overtime. (*Id.*) Moreover, they are compensated through merit raises and bonuses and are evaluated through the PPR Evaluation System – like all other supervisory employees at EMI. (IV, 39-41, 220-26, 306-10, 378-82, 439-40.) They also have a significant role in the training of new Dispatchers, effectively recommending the promotion of Assistant Dispatchers, and they have the discretion to determine what duties and responsibilities Dispatcher trainees are capable of performing. (IV, 86-89, 263-69.)

The Board's decision fails to consider (or even mention) these numerous secondary indicia, which serve to further evidence the supervisory status of Dispatchers.

III. The Board's Unreasonable Eleven-Year Delay in Determining the Supervisory Status of the Dispatchers at EMI Has Actually Prejudiced the Company.

Any damages remedy accruing against EMI has been exponentially increased by Board inaction for more than a decade. In cases of inordinate delay, courts retain discretion to apply the doctrine of laches against government agencies, including the Board. *See, e.g., Pleasantview Nursing Home, Inc. v. NLRB*, 351 F.3d 747, 765 (6th Cir. 2003). Specifically, laches may be asserted against the Board if its actions: (1) were dilatory; and (2) resulted in actual prejudice to the asserting party. *Occidental Life Ins. Co. of Cal. v. EEOC*, 432 U.S. 355, 373 (1977).

This case originated more than a decade ago in 2003, when EMI filed a unit-clarification petition, lawfully seeking to remove the Dispatchers from the bargaining unit. (III, Bd.Ex.1a.) Following a hearing in 2003 and the Board's acceptance of the case for review in 2004, the Board waited more than two years before doing anything – and, at that time, it merely remanded the case back to Region 15 for further consideration in light of the *Oakwood Healthcare* trilogy. (V, Bd.Ex.1b.) Again, after a hearing in 2006 and supplemental briefing, the Board accepted the case for review on April 11, 2007. (VII, 1916.) But the Board did nothing for nearly five years(!), before finally issuing a decision on December 30, 2011. (VII, 1925-36.)

Even following this decision, however, the Board's pattern of delay continued while it defended (for four years) President Obama's invalid recess appointments to the Board. (Doc. 00512205871, Case No. 12-60644 pp. 30-71.) And even after the Supreme Court unanimously ruled unconstitutional these appointments with the *Noel Canning* decision, the Board continued their delay tactics by insisting that the case be remanded back to the Board for consideration,³⁹ instead of allowing this Court to immediately consider the merits of the case as urged by EMI in accordance with this Court's decision in *D.R. Horton, Inc. v. NLRB*, 737 F.3d 344 (5th Cir. 2013) and various decisions of other Courts of Appeals.⁴⁰ *See, e.g., NLRB v. Enter. Leasing Co. Southeast, L.L.C.*, 722 F.3d 609, 660 (4th Cir. 2013), *cert. denied* No. 13-671, 2014 U.S. LEXIS 4689 (2014); *NLRB v. New Vista Nursing & Rehab.*, 719 F.2d 203, 244 (3d Cir. 2013). These delays were completely unnecessary and caused the case to unnecessarily languish for, cumulatively, several more years.

During these delays, EMI attempted to deal with the uncertainty of the Dispatchers' status in a responsible and lawful manner. First, in 2003, prior to the expiration of the then-current Collective Bargaining Agreement, EMI and the Union

³⁹ *See* Doc. No. 00512684060, Case No. 12-60644, Motion of the National Labor Relations Board to Vacate and Remand and for Expedited Issuance of Mandate in Light of *NLRB v. Noel Canning*, dated July 2, 2014.

⁴⁰ *See* Doc. No. 00512702622, Case No. 12-60644, Entergy Mississippi, Inc.'s Opposition to Respondent – Cross Petitioner National Labor Relations Board's Motion to Vacate and Remand and for Expedited Issuance of Mandate in Light of *NLRB v. Noel Canning*, dated July 17, 2014.

entered into a Side Agreement and Memorandum of Agreement. (VII, 1949-51). Thereafter, in the 2006 collective bargaining negotiations, EMI and the Union entered into an additional Memorandum of Agreement regarding the continued treatment of the Dispatchers. (VII, 1981-82.)⁴¹ In fact, this Memorandum of Understanding still is in effect, governing the Parties' conduct through the pendency of this appeal.

Here, the eleven-year delay (August 11, 2003 to October 31, 2014) in this case certainly satisfies the "dilatory" requirement, as delays of far less time have been recognized to be unreasonable. *See, e.g., EEOC v. Dresser Indus., Inc.*, 668 F.2d 1199, 1203 (11th Cir. 1982); *EEOC v. Propak Logistics, Inc.*, No. 09-cv-311, 2012 U.S. Dist. LEXIS 110096, at *8-10 (W.D.N.C. Aug. 7, 2012); *EEOC v. PBM Graphics, Inc.*, 877 F. Supp. 2d 334, 364 (M.D.N.C. 2012). Given that eight circuit courts addressing the central issue of this case have found Dispatchers to be statutory supervisors, the Board's delay has been all the more unreasonable and unacceptable.

Moreover, this unnecessary delay has caused actual prejudice to EMI. Due to this eleven-year tie-up, the Unions unjustly can claim additional liability and damages – in spite of the fact that EMI (i) acted at all times in accordance with this

⁴¹ A copy of this Memorandum of Agreement was inadvertently omitted from the record. On March 23, 2015, counsel filed a Joint Stipulation to Supplement the Certified Record to include this Exhibit.

Court's controlling precedent (*Entergy Gulf States*) and (ii) properly and appropriately sought review of its Dispatchers' status in a procedurally lawful manner on the heels of *Entergy Gulf States* by filing a unit-clarification petition and negotiating two side agreements with the Union, wherein the parties amicably agreed on the treatment of the Dispatchers pending the outcome of the unit-clarification proceeding underlying this appeal. But none of the parties realized – or intended – that these side agreements would govern for nearly a decade, pending the Board's unreasonable delays. *See, e.g., EEOC v. Alioto Fish Co.*, 623 F.2d 86, 89 (9th Cir. 1980) (“[t]he delay undeniably has dimmed the memories of available witnesses and *has greatly enlarged Alioto's potential back pay liability* because the EEOC seeks relief for all persons discriminated against by Alioto. *We find that these undisputed facts provide compelling evidence that Alioto was substantially prejudiced in its defense of claims for back pay.* The district court did not err in granting summary judgment as to those claims [on the ground of laches.]”) (emphasis added); *EEOC v. Peterson, Howell & Heather, Inc.*, 702 F. Supp. 1213, 1224 (D. Md. 1989) (“The Court concludes that the defendants have established substantial prejudice in defense of the claims for back pay, and, accordingly, summary judgment on the grounds of laches must be granted on all such claims. During the EEOC's administrative delays, the back pay meter has been running, thus exposing the defendants to greater pecuniary losses.”). Finally, it is worth

noting that during these proceedings, there have been considerable corporate and regulatory changes that have enhanced the job duties and responsibilities for Dispatchers, particularly Transmission Dispatchers’ – all while subjecting EMI to undertake additional and unnecessary risk – since the Dispatcher status should have been resolved long ago.

At all times, EMI has attempted to proceed in a lawful and reasonable manner in its treatment of the Dispatchers. The Board’s eleven-year delay in handling this case is more than “regrettable” as posited by the Board; it has unfairly and irreparably prejudiced EMI in this matter. As such, this Court should apply the doctrine of laches.

CONCLUSION

The Dispatchers at EMI are supervisors pursuant to Section 2(11) of the NLRA. Accordingly, EMI cannot be required to bargain with the Unions over the terms and conditions of the Dispatchers’ employment. This Court should therefore deny enforcement of the Board’s order of October 31, 2014.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify on March 23, 2015, that a true and correct copy of this document was served via electronic means through transmission facilities from the Court upon those parties authorized to participate and access the Electronic Filing System for this Court in the above-captioned action:

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CERTIFICATE OF COMPLIANCE

1. This Brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because:

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Dated: March 23, 2015

APPENDIX A¹NLRB Supervisory Decisions Based Upon
*Oakwood Healthcare, Inc.*²

Post-Oakwood Decisions Finding Non-Supervisory Status
<i>Beverly Enterps.-Minn., Inc. d/b/a Golden Crest Healthcare Center</i> , 348 N.L.R.B. 727 (2006)
<i>Croft Metals, Inc.</i> , 348 N.L.R.B. 717 (2006)
<i>Avante at Wilson, Inc.</i> , 348 N.L.R.B. 1056 (2006)
<i>Austal USA, L.L.C.</i> , 349 N.L.R.B. 561 (2007)
<i>J. Shaw Assocs., LLC</i> , 349 N.L.R.B. 939 (2007)
<i>Shaw, Inc.</i> , 350 N.L.R.B. 354 (2007)
<i>I.H.S. Acquisition No. 114, d/b/a/ Lynwood Manor</i> , 350 N.L.R.B. 489 (2007)
<i>CGLM, Inc.</i> , 350 N.L.R.B. 974 (2007)
<i>Paramus Ford, Inc.</i> , 351 N.L.R.B. 1019 (2007)
<i>Spirit Constr. Servs. Inc.</i> , 351 N.L.R.B. 1042 (2007)
<i>A and G, Inc., d/b/a Alstyle Apparel</i> , 351 N.L.R.B. 1287 (2007)
<i>Talmadge Park, Inc.</i> , 351 N.L.R.B. 1241 (2007)

¹ Appendices A and B have not been included in the word count for this Brief in accordance with undersigned counsel's staff's conversations with Deputy Clerk, Dawn Victoriano, on March 12, 2015.

² To populate this chart, Counsel researched *Oakwood* by using Westlaw's KeyCite research function, and then reviewed the cases identified when clicking "Citing References." Decisions which were not instructive (e.g. decisions by the Division of Judges, or did not address the topic in a meaningful way) have been excluded. Counsel additionally relied upon charts cited in the Appellate Brief of NStar Electric Co. in Case No. 14-1622, filed October 15, 2014, before the United States Court of Appeals for the First Circuit.

Post-Oakwood Decisions Finding Non-Supervisory Status
<i>Network Dynamics Cabling, Inc.</i> , 351 N.L.R.B. 1423 (2007)
<i>Loyalhanna Health Care Assocs. d/b/a Loyalhanna Care Ctr.</i> , 352 N.L.R.B. 863 (2008)
<i>E. Buffet & Rest., Inc.</i> , 352 N.L.R.B. 975 (2008)
<i>Barstow Cmty. Hosp.</i> , 352 N.L.R.B. 1052 (2008) ³
<i>GFC Crane Consultants, Inc.</i> , 352 N.L.R.B. 1236 (2008)
<i>PPG Aerospace Indus., Inc.</i> , 353 N.L.R.B. 223 (2008)
<i>Am. Directional Boring, Inc., d/b/a ADB Util. Contractors, Inc.</i> , 353 N.L.R.B. 166 (2008) ⁴
<i>Rochelle Waste Disposal, LLC</i> , 353 N.L.R.B. 416 (2008)
<i>Bryant Health Ctr., Inc.</i> , 353 N.L.R.B. 739 (2009)
<i>Rockspring Dev., Inc.</i> , 353 N.L.R.B. 1041 (2009)
<i>Diversified Enters., Inc.</i> , 353 N.L.R.B. 1174 (2009)
<i>Loparex LLC</i> , 353 N.L.R.B. 1224 (2009)
<i>Susan Oles d/b/a/ Susan Oles, DMD</i> , 354 N.L.R.B. 140 (2009)
<i>Family Healthcare, Inc.</i> , 354 N.L.R.B. 254 (2009)
<i>Regal Health & Rehab. Ctr., Inc.</i> , 354 N.L.R.B. 466 (2009)
<i>Pac. Coast M.S. Indus. Co., Ltd.</i> , 355 N.L.R.B. 1422 (2010)
<i>Recall Secure Destruction Servs., Inc.</i> , 9-RC-18280, 2011 WL 828383 (N.L.R.B. Mar. 1, 2011)

³ Vacated by No. 09-70771, 2010 WL 853379 (9th Cir. Aug. 26, 2010).

⁴ Denied enforcement by 383 F. App'x 394 (8th Cir. 2010).

Post-Oakwood Decisions Finding Non-Supervisory Status
<i>Pride Ambulance Co. d/b/a Pride Care Ambulance, Care-A-Van</i> , 356 N.L.R.B. No. 128 (2011)
<i>DirecTV</i> , 357 N.L.R.B. No. 149 (2011)
<i>A.D. Conner, Inc.</i> , 357 N.L.R.B. No. 154 (2011)
<i>Entergy Miss., Inc.</i> , 357 N.L.R.B. No. 178 (2011)
<i>The Fremont-Rideout Health Grp. d/b/a Fremont Med. Ctr.</i> , 357 N.L.R.B. No. 158 (2011)
<i>Meredith Corp.</i> , 17-RC-068104, 2012 WL 441151 (N.L.R.B. Feb. 13, 2012) ⁵
<i>Connecticut Humane Soc'y</i> , 358 N.L.R.B. No. 31 (2012)
<i>Alternate Concepts, Inc.</i> , 358 N.L.R.B. No. 38 (2012)
<i>Flex-N-Gate Texas, LLC</i> , 358 N.L.R.B. No. 76 (2012)
<i>Station Casinos, Inc.</i> , 358 N.L.R.B. No. 77 (2012)
<i>Entergy Miss., Inc.</i> , 358 N.L.R.B. No. 99 (2012) (related to case above) ⁶
<i>Ambassador Servs., Inc.</i> , 358 N.L.R.B. No. 130 (2012) ⁷
<i>G4S Regulated Sec. Solutions</i> , 358 N.L.R.B. No. 160 (2012) ⁸
<i>Brusco Tug & Barge, Inc.</i> , 359 N.L.R.B. No. 43 (2012)
<i>D&J Ambullette Serv., Inc.</i> , 359 N.L.R.B. No. 62 (2013)

⁵ The NLRB denied review but “agree[d] with the Regional Director that under the *Oakwood* standard,” the individuals were not supervisors. *Id.* at *1, n.1.

⁶ Review granted, order vacated by 576 F. App’x 415 (5th Cir. 2014).

⁷ Vacated, but later affirmed by 361 N.L.R.B. No. 106 (2014).

⁸ Decision set aside by Nos. 12-CA-026644, 12-CA-026811, 2014 WL 3499872 (N.L.R.B. 2014).

Post-Oakwood Decisions Finding Non-Supervisory Status
<i>Veritas Health Servs., Inc. d/b/a Chino Valley Med. Ctr.</i> , 359 N.L.R.B. No. 111 (2013) ⁹
<i>Ozburn-Hessey Logistics, LLC</i> , 359 N.L.R.B. No. 109 (2013) ¹⁰
<i>AC Specialists, Inc.</i> , 359 N.L.R.B. No. 159 (2013) ¹¹
<i>Trinity Continuing Care Servs.</i> , 359 N.L.R.B. No. 162 (2013)
<i>Cnty. Educ. Centers, Inc.</i> , 360 N.L.R.B. No. 17 (2014)
<i>Amglo Kemlite Labs., Inc.</i> , 360 N.L.R.B. No. 51 (2014)
<i>Securitas Critical Infrastructure Servs., Inc.</i> , Case 18-RC-120181, 2014 WL 1339670 (N.L.R.B. Apr. 4, 2014) ¹²
<i>Matson Terminals, Inc.</i> , Case 20-RC-121101, 2014 WL 2466329 (N.L.R.B. June 2, 2014) ¹³
<i>UHS-Corona, Inc.</i> , Case 21-RC-094258, 2014 WL 2759113 (N.L.R.B. June 17, 2014)
<i>Meredith Corp.</i> , 361 N.L.R.B. No. 128 (2014)
<i>Modesto Radiology Imaging Inc.</i> , 361 N.L.R.B. No. 84 (2014)
<i>Entergy Miss. Inc.</i> , 361 N.L.R.B. No. 89 (2014)

⁹ Decision set aside by No. 31-CA-029713, 2014 WL 2929755 (N.L.R.B. 2014).

¹⁰ Decision set aside by No. 26-CA-024057, 2014 WL 2929772 (N.L.R.B. 2014), but later affirmed by 361 N.L.R.B. 100 (2014).

¹¹ Reconsideration granted, judgment set aside by No. 12-CA-076395, 2014 WL 4545625 (N.L.R.B. 2014).

¹² Citing to *Oakwood*, but the NLRB denied review.

¹³ The Regional Director found no supervisory status under *Oakwood*, and the NLRB declined to review.

Post-Oakwood Decisions Finding Non-Supervisory Status
<i>Pro-Tec Fire Services, Ltd.</i> , Case 31-RC-133248, 2014 WL 5388832 (N.L.R.B. Oct. 22, 2014) ¹⁴
<i>Asplundh Tree Expert Co.</i> , Case 07-RC-131249, 2014 WL 4926202 (N.L.R.B. Oct. 2, 2014) ¹⁵
<i>CNN Am. Inc., et al.</i> , 361 N.L.R.B. No. 47 (2014)
<i>The Republican Co.</i> , 361 N.L.R.B. No. 15 (2014)

Post-Oakwood Decisions Finding Supervisory Status¹⁶	
<u>Case Name</u>	<u>Decision also ruled against employer</u>
<i>Metro Transp. LLC, d/b/a Metro. Transp. Servs., Inc.</i> , 351 N.L.R.B. 657 (2007) ¹⁷	at 657-66.
<i>RCC Fabricators, Inc.</i> , 352 N.L.R.B. 701 (2008)	at 701-702, n.5.
<i>Coastal Insulation Corp.</i> , 354 N.L.R.B. 495 (2009)	at 515-19.
<i>Akal Sec. Inc.</i> , 354 N.L.R.B. 122 (2009)	at 132-36.
<i>PPG Aerospace Indus., Inc.</i> , 355 N.L.R.B. 103 (2010)	at 103.
<i>Gen. Die Casters, Inc.</i> , 359 N.L.R.B. No. 7 (2012)	at slip op. at *1-2.

¹⁴ The Regional Director found no supervisory status, and the NLRB declined to review.

¹⁵ The Regional Director found no supervisory status, and the NLRB declined to review.

¹⁶ In each of these cases, the employer argued against supervisory status. And, in each decision, the Board ruled against the employer.

¹⁷ The Board found supervisory status of an individual, and therefore, it dismissed charges that the employer's interrogation of and implied threats toward the individual violated the law. *Id.* at 657-61. However, the Board ultimately ruled against the employer for its discharge of another employee. *Id.* at 660.

APPENDIX B

NLRB Supervisory Decisions
 Preceding *Oakwood Healthcare, Inc.*¹⁸

Pre-Oakwood Decisions Finding Non-Supervisory Status
<i>PHC-Elko, Inc.</i> , 347 N.L.R.B. 1425 (2006)
<i>Extendicare Health Servs., Inc.</i> , 347 N.L.R.B. 544 (2006)
<i>J.C. Penney Corp., Inc.</i> , 347 N.L.R.B. 127 (2006)
<i>Oasis Mech., Inc.</i> , 346 N.L.R.B. 1011 (2006)
<i>Airport 2000 Concessions, LLC</i> , 346 N.L.R.B. 958 (2006)
<i>The Strand Theatre of Shreveport Corp.</i> , 346 N.L.R.B. 523 (2006)
<i>Millard Refrigerated Services, Inc.</i> , 345 N.L.R.B. No. 95 (2005) ¹⁹
<i>Dynasteel Corp.</i> , 346 N.L.R.B. 86 (2005)
<i>Siemens Bldg. Technologies, Inc.</i> , 346 N.L.R.B. 53 (2005)
<i>Riverboat Servs. of Ind., Inc.</i> , 345 N.L.R.B. 1286 (2005)
<i>The Wackenhut Corp.</i> , 345 N.L.R.B. 850 (2005)
<i>Ctr. Constr. Co., Inc.</i> , 345 N.L.R.B. 729 (2005) ²⁰
<i>Park 'N Go of Minn. LP</i> , 344 N.L.R.B. 1260 (2005)

¹⁸ To populate this chart, Counsel searched Westlaw using the term “2(11)” and various combinations of words containing “supervisor” for Board decisions between January 1, 1998 and September 29, 2006. The search identified over 700 cases, although many were not instructive (e.g., decisions by the Division of Judges, did not address the topic in a meaningful way, etc.). Counsel additionally relied upon charts cited in the Appellate Brief of NStar Electric Co. in Case No. 14-1622, filed October 15, 2014, before the United States Court of Appeals for the First Circuit.

¹⁹ The Board found six individuals were supervisors and two individuals were not supervisors.

²⁰ The Board found three individuals were not supervisors and two individuals were supervisors.

Pre-Oakwood Decisions Finding Non-Supervisory Status
<i>Albertsons, Inc.</i> , 344 N.L.R.B. 1172 (2005)
<i>Pac. Beach Corp.</i> , 344 N.L.R.B. 1160 (2005)
<i>Nat'l Steel Supply, Inc.</i> , 344 N.L.R.B. 973 (2005)
<i>Erica Inc., Gen. Partner</i> , 344 N.L.R.B. 799 (2005)
<i>Stanford New York, LLC</i> , 344 N.L.R.B. 279 (2005)
<i>Armstrong Mach. Co., Inc.</i> , 343 N.L.R.B. 1149 (2004)
<i>Valley Slurry Seal Co.</i> , 343 N.L.R.B. 233 (2004)
<i>Wilshire at Lakewood</i> , 343 N.L.R.B. 141 (2004) ²¹
<i>Volair Contractors, Inc.</i> , 341 N.L.R.B. 673 (2004)
<i>Davey Roofing, Inc.</i> , 341 N.L.R.B. 222 (2004)
<i>Los Angeles Water & Power Employees' Ass'n.</i> , 340 N.L.R.B. 1232 (2003)
<i>Wal-Mart Stores, Inc.</i> , 340 N.L.R.B. 220 (2003)
<i>Pro-Spec Painting, Inc.</i> , 339 N.L.R.B. 946 (2003)
<i>Dole Fresh Vegetables, Inc.</i> , 339 N.L.R.B. 785 (2003)
<i>Am. Armored Car, Ltd.</i> , 339 N.L.R.B. 600 (2003)
<i>Mid-South Drywall Co., Inc.</i> , 339 N.L.R.B. 480 (2003)
<i>Prop. Mkts. Grp., Inc.</i> , 339 N.L.R.B. 199 (2003)
<i>Dean & Deluca New York, Inc.</i> , 338 N.L.R.B. 1046 (2003)
<i>Earthgrains Co.</i> , 338 N.L.R.B. 845 (2003)

²¹ Vacated by 345 N.L.R.B. No. 80 (2005), reversed by 480 F.3d 1161 (D.C. Cir. 2007).

Pre-Oakwood Decisions Finding Non-Supervisory Status
<i>Nurses United for Improved Patient Healthcare</i> , 338 N.L.R.B. 837 (2003)
<i>Clock Elec., Inc.</i> , 338 N.L.R.B. 806 (2003)
<i>Wake Elec. Membership Corp.</i> , 338 N.L.R.B. 298 (2002)
<i>Ready Mix, Inc.</i> , 337 N.L.R.B. 1189 (2002)
<i>Cent. Plumbing Specialties, Inc.</i> , 337 N.L.R.B. 973 (2002)
<i>Franklin Hosp. Med. Ctr.</i> , 337 N.L.R.B. 826 (2002)
<i>Tracker Marine, LLC</i> , 337 N.L.R.B. 644 (2002) ²²
<i>Tim Foley Plumbing Servs., Inc.</i> , 337 N.L.R.B. 328 (2001)
<i>Ryder Student Transp. Servs., Inc.</i> , 336 N.L.R.B. 882 (2001)
<i>Willamette Indus., Inc.</i> , 336 N.L.R.B. 743 (2001)
<i>Pan-Oston Co.</i> , 336 N.L.R.B. 305 (2001)
<i>Ken-Crest Servs.</i> , 335 N.L.R.B. 777 (2001)
<i>Fantasia Fresh Juice Co.</i> , 335 N.L.R.B. 754 (2001)
<i>Beverly Health & Rehab. Servs., Inc.</i> , 335 N.L.R.B. 635 (2001)
<i>Ferguson Elec. Co., Inc.</i> , 335 N.L.R.B. 142 (2001)
<i>St. Barnabas Hosp.</i> , 334 N.L.R.B. 1000 (2001)
<i>Garage Mgmt. Corp.</i> , 334 N.L.R.B. 940 (2001)
<i>Webco Indus.</i> , 334 N.L.R.B. 608 (2001)
<i>DMI Distribution of Delaware, Ohio, Inc.</i> , 334 N.L.R.B. 409 (2001)

²² The Board affirmed the judge's ruling that, while two individuals were supervisors, the remaining were not supervisors.

Pre-Oakwood Decisions Finding Non-Supervisory Status
<i>Dynamic Sci., Inc.</i> , 334 N.L.R.B. 391 (2001)
<i>Paramount Parks, Inc.</i> , 334 N.L.R.B. 246 (2001)
<i>Kanawha Stone Co., Inc.</i> , 334 N.L.R.B. 235 (2001)
<i>MCAR, Inc.</i> , 333 N.L.R.B. 1098 (2001)
<i>Marian Manor for the Aged & Infirm, Inc.</i> , 333 N.L.R.B. 1084 (2001)
<i>Orland Park Motor Cars, Inc.</i> , 333 N.L.R.B. 1017 (2001)
<i>Westchester Iron Works Corp.</i> , 333 N.L.R.B. 859 (2001)
<i>SAIA Motor Freight Line, Inc.</i> , 333 N.L.R.B. 784 (2001)
<i>Madison Square Garden</i> , 333 N.L.R.B. 643 (2001)
<i>Heritage Hall</i> , 333 N.L.R.B. 458 (2001)
<i>Training Sch. at Vineland</i> , 332 N.L.R.B. 1412 (2000)
<i>Michigan Masonic Home</i> , 332 N.L.R.B. 1409 (2000)
<i>Loyalhanna Health Care Assocs.</i> , 332 N.L.R.B. 933 (2000)
<i>Arlington Elec., Inc.</i> , 332 N.L.R.B. 845 (2000)
<i>Allstate Ins. Co.</i> , 332 N.L.R.B. 759 (2000)
<i>Debbie Reynolds Hotel, Inc.</i> , 332 N.L.R.B. 466 (2000)
<i>Coventry Health Continuum</i> , 332 N.L.R.B. 52 (2000)
<i>HADCO Aluminum & Metal Corp.</i> , 331 N.L.R.B. 518 (2000)
<i>GRB Entm't, Inc.</i> , 331 N.L.R.B. 320 (2000)
<i>Belle Knitting Mills, Inc.</i> , 331 N.L.R.B. 80 (2000)

Pre-Oakwood Decisions Finding Non-Supervisory Status
<i>Carlisle Engineered Products, Inc.</i> , 330 N.L.R.B. 1359 (2000)
<i>Harborside Healthcare, Inc.</i> , 330 N.L.R.B. 1334 (2000)
<i>Dico Tire, Inc.</i> , 330 N.L.R.B. 1252 (2000)
<i>Peter Scalamandre & Sons, Inc.</i> , 330 N.L.R.B. 1191 (2000)
<i>Freeman Decorating Co.</i> , 330 N.L.R.B. 1143 (2000)
<i>Capri Sun, Inc.</i> , 330 N.L.R.B. 1124 (2000)
<i>Third Coast Emergency Physicians, P.A.</i> , 330 N.L.R.B. 756 (2000)
<i>Dino & Sons Realty Corp.</i> , 330 N.L.R.B. 680 (2000)
<i>Centurion Auto Transport, Inc.</i> , 329 N.L.R.B. No. 42 (1999)
<i>One Stop Immigration & Educ. Ctr., Inc.</i> , 330 N.L.R.B. 413 (1999)
<i>Boston Med. Ctr. Corp.</i> , 330 N.L.R.B. 152 (1999)
<i>California Portland Cement Co.</i> , 330 N.L.R.B. 144 (1999)
<i>Rondout Elec., Inc.</i> , 329 N.L.R.B. 957 (1999)
<i>Medtech Sec., Inc.</i> , 329 N.L.R.B. 926 (1999)
<i>Elmhurst Extended Care Facilities, Inc.</i> , 329 N.L.R.B. 535 (1999)
<i>McGraw-Hill Broad. Co., Inc.</i> , 329 N.L.R.B. 454 (1999)
<i>King Broad, Co.</i> , 329 N.L.R.B. 378 (1999)
<i>Vencor Hosp.-Los Angeles</i> , 328 N.L.R.B. 1136 (1999)
<i>Acme Mkts., Inc.</i> , 328 N.L.R.B. 1208 (1999)
<i>Bethany Med. Ctr.</i> , 328 N.L.R.B. 1094 (1999)

Pre-Oakwood Decisions Finding Non-Supervisory Status
<i>Mississippi Power & Light Co.</i> , 328 N.L.R.B. 965 (1999) ²³
<i>Crittenton Hosp.</i> , 328 N.L.R.B. 879 (1999)
<i>Tree-Free Fiber Co., Ltd. Liability Co.</i> , 328 N.L.R.B. 389 (1999)
<i>Macy's W., Inc.</i> , 327 N.L.R.B. 1222 (1999)
<i>Nat'l Health Care, L.P.</i> , 327 N.L.R.B. 1175 (1999) ²⁴
<i>Masterform Tool Co., Cylinder Components, Inc.</i> , 327 N.L.R.B. 1071 (1999)
<i>Benchmark Mech. Contractors, Inc.</i> , 327 N.L.R.B. 829 (1999)
<i>Boardwalk Motors</i> , 327 N.L.R.B. 784 (1999)
<i>Bd. of Soc. Ministry</i> , 327 N.L.R.B. 257 (1999)
<i>Custom Mattress Mfg., Inc.</i> , 327 N.L.R.B. 111 (1998)
<i>Victoria Partners</i> , 327 N.L.R.B. 54 (1998)
<i>Millard Refrigerated Servs., Inc.</i> , 326 N.L.R.B. 1437 (1998)
<i>Ryder Truck Rental, Inc.</i> , 326 N.L.R.B. 1386 (1998)
<i>Alois Box Co., Inc.</i> , 326 N.L.R.B. 1177 (1998) ²⁵
<i>Greenhorne & O'Mara, Inc.</i> , 326 N.L.R.B. 514 (1998)
<i>Youville Health Care Ctr., Inc.</i> , 326 N.L.R.B. 495 (1998)
<i>Hausner Hard-Chrome of Ky., Inc.</i> , 326 N.L.R.B. 426 (1998)
<i>Gen. Sec. Servs. Corp.</i> , 326 N.L.R.B. 312 (1998)

²³ Abrogated by 253 F.3d 203 (5th Cir. 2001).

²⁴ Affirmed in part, vacated in part by 234 F.3d 1269 (6th Cir. 2000).

²⁵ The Board found that one individual was a supervisor and one individual was not a supervisor.

Pre-Oakwood Decisions Finding Non-Supervisory Status
<i>Mount Sinai Hosp.</i> , 325 N.L.R.B. 1136 (1998)
<i>Epic Sec. Corp.</i> , 325 N.L.R.B. 772 (1998)
<i>Martin Enters., Inc.</i> , 325 N.L.R.B. 714 (1998)
<i>L. Suzio Concrete Co.</i> , 325 N.L.R.B. 392 (1998)

Pre-Oakwood Decisions Finding Supervisory Status
<i>Jesco Inc.</i> , 347 N.L.R.B. No. 92 (2006)
<i>Am. River Transp. Co.</i> , 347 N.L.R.B. 925 (2006)
<i>Cent. Valley Meat Co.</i> , 346 N.L.R.B. 1078 (2006)
<i>Marquette Transp./Bluegrass Marine</i> , 346 N.L.R.B. 543 (2006)
<i>Millard Refrigerated Servs., Inc.</i> , 345 N.L.R.B. No. 95 (2005) ²⁶
<i>T-West. Sales & Serv., Inc.</i> , 346 N.L.R.B. 118 (2005)
<i>Wilshire at Lakewood</i> , 345 N.L.R.B. 1050 (2005) ²⁷
<i>Bredero Shaw</i> , 345 N.L.R.B. 782 (2005)
<i>Ellison Media Co.</i> , 344 N.L.R.B. 1112 (2005)

²⁶ The Board found six individuals were supervisors and two individuals were not supervisors.

²⁷ Decision reversed by 480 F.3d 1161 (D.C. Cir. 2007).

Pre-Oakwood Decisions Finding Supervisory Status
<i>Mountaineer Park, Inc.</i> , 343 N.L.R.B. 1473 (2004)
<i>The Jewish Home for the Elderly of Fairfield Cnty.</i> , 343 N.L.R.B. 1069 (2004)
<i>Harborside Healthcare, Inc.</i> , 343 N.L.R.B. 906 (2004)
<i>Mays Elec. Co. Inc.</i> , 343 N.L.R.B. 121 (2004)
<i>The Kroger Co.</i> , 342 N.L.R.B. 202 (2004)
<i>Int'l Masonry Inst.</i> , 342 N.L.R.B. 73 (2004)
<i>Donaldson Bros. Ready Mix, Inc.</i> , 341 N.L.R.B. 958 (2004)
<i>Air 2, LLC</i> , 341 N.L.R.B. 176 (2004)
<i>Double Eagle Hotel & Casino</i> , 341 N.L.R.B. 112 (2004)
<i>Sheet Metal Workers Int'l Ass'n</i> , 340 N.L.R.B. 1240 (2003)
<i>Progressive Transps. Servs., Inc.</i> , 340 N.L.R.B. 1044 (2003)
<i>Arlington Masonry Supply, Inc.</i> , 339 N.L.R.B. 817 (2003)
<i>Palagonia Bakery Co., Inc.</i> , 339 N.L.R.B. 515 (2003)
<i>Brad Snodgrass, Inc.</i> , 338 N.L.R.B. 917 (2003)
<i>Local No. 10</i> , 338 N.L.R.B. 701 (2002)
<i>Pratt Towers, Inc.</i> , 338 N.L.R.B. 61 (2002)
<i>Am. Commercial Barge Line Co.</i> , 337 N.L.R.B. 1070 (2002)
<i>Sears, Roebuck & Co.</i> , 337 N.L.R.B. 443 (2002)
<i>Alter Barge Lines, Inc.</i> , 336 N.L.R.B. 1266 (2001)
<i>Ingram Barge Co.</i> , 336 N.L.R.B. 1259 (2001)

Pre-Oakwood Decisions Finding Supervisory Status
<i>Cargill, Inc.</i> , 336 N.L.R.B. 1114 (2001)
<i>Mingo Logan Coal Co.</i> , 336 N.L.R.B. 83 (2001)
<i>Wal-Mart Stores, Inc.</i> , 335 N.L.R.B.1310 (2001)
<i>Fred Meyer Alaska, Inc.</i> , 334 N.L.R.B. 646 (2001)
<i>Desert Pines Golf Club</i> , 334 N.L.R.B. 265 (2001)
<i>Terry Mach. Co.</i> , 332 N.L.R.B. 855 (2000) ²⁸
<i>Chem. Solvents, Inc.</i> , 331 N.L.R.B. 706 (2000)
<i>Extendicare Health Facils., Inc.</i> , 330 N.L.R.B. 1377 (2000)
<i>Venture Indus., Inc.</i> , 330 N.L.R.B. 1133 (2000)
<i>Rankin & Rankin, Inc.</i> , 330 N.L.R.B. 1026 (2000)
<i>Westwood Health Care Ctr.</i> , 330 N.L.R.B. 935 (2000)
<i>Douglas Food Corp.</i> , 330 N.L.R.B. 821 (2000)
<i>Beverly Enterps.-Mass., Inc.</i> , 329 N.L.R.B. 233 (1999)
<i>Int'l Ship Repair & Marine Servs., Inc.</i> , 329 N.L.R.B. 213 (1999)
<i>Entergy Sys. & Serv., Inc.</i> , 328 N.L.R.B. 902 (1999)
<i>D & T Limousine Serv., Inc.</i> , 328 N.L.R.B. 769 (1999)
<i>Zeppelin Elec. Co., Inc.</i> , 328 N.L.R.B. 452 (1999)
<i>Wallace Int'l De Puerto Rico, Inc.</i> , 328 N.L.R.B. 29 (1999)

²⁸ The Board assumed “for purposes of [their] analysis” that the individuals were supervisors, but did not directly rule on the issue. *Id.* at 856.

<i>Pre-Oakwood Decisions Finding Supervisory Status</i>
<i>Pepsi-Cola Co.</i> , 327 N.L.R.B. 1062 (1999)
<i>Venture Indus., Inc.</i> , 327 N.L.R.B. 918 (1999)
<i>CTI Alaska, Inc.</i> , 326 N.L.R.B. 1121 (1998)
<i>R.G. Burns Elec., Inc.</i> , 326 N.L.R.B. 440 (1998)
<i>Union Square Theatre Mgmt., Inc.</i> , 326 N.L.R.B. 70 (1998)
<i>H & N Fish Co.</i> , 326 N.L.R.B. 22 (1998)
<i>Alianza Dominicana</i> , 325 N.L.R.B. 987 (1998)
<i>Overnite Transp. Co.</i> , 325 N.L.R.B. 612 (1998)
<i>Broadway, Inc.</i> , 325 N.L.R.B. 409 (1998)
<i>Connecticut Health Care Partners</i> , 325 N.L.R.B. 351 (1998)
<i>Alois Box Co., Inc.</i> , 362 N.L.R.B. 1177 (1998) ²⁹

²⁹ The Board found that one individual was a supervisor and one individual was not a supervisor.